No. 92-9059-CSY
Status: GRANTED
CAPITAL CASE

Title: Jonathan Dale Simmons, Petitioner
v.
South Carolina

Docketed:
June 8, 1993

Court: Supreme Court of South Carolina

Counsel for petitioner: Bruck,David

Counsel for respondent: Medlock,T. Travis, Zelenka,Donald J.

Entry	Date	Note	Proceedings and Orders
1	Jun 8 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jul 9 1993		Brief of respondent South Carolina in opposition filed.
4	Jul 15 1993		DISTRIBUTED. September 27, 1993
5	Jul 27 1993	X	Reply brief of petitioner filed.
7	Oct 4 1993		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m.,Wednesday,January 5, 1994. Rule 29 does not apply.
			**********
11	Oct 5 1993		Record filed.
		*	Certified proceedings Supreme Court of South Carolina (BOX)
8	Oct 18 1993	G	Motion of petitioner for appointment of counsel filed.
10	Oct 29 1993		Joint appendix filed.
9	Nov 1 1993		Motion for appointment of counsel GRANTED and it is ordered that David I. Bruck, Esquire, of Columbia, South Carolina, is appointed to serve as counsel for the petitioner in this case.
13	Nov 15 1993	G	Motion of Donna L. Markle, et al. for leave to file a brief as amici curiae filed.
14	Nov 16 1993		Brief of petitioner Jonathan Dale Simmons filed.
15	Nov 22 1993		SET FOR ARGUMENT TUESDAY JANUARY 18, 1994. (2ND CASE).
17	Dec 1 1993		CIRCULATED.
18	Dec 6 1993		Motion of Donna L. Markle, et al. for leave to file a brief as amici curiae GRANTED.
19	Dec 14 1993	X	Brief of respondent South Carolina filed.
20	Dec 14 1993	X	Brief amici curiae of Idaho, et al. filed.
21	Dec 27 1993	X	Reply brief of petitioner Jonathan Dale Simmons filed.
22	Jan 18 1994		ARGUED.

ORIGINAL

92-9059

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. 92 -

JONATHAN DALE SIMMONS,

Petitioner,

v.

SOUTH CAROLINA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

1.

DOES THE EIGHTH AMENDMENT ENTITLE A CAPITAL DEFENDANT TO HAVE THE SENTENCING JURY INFORMED, AS A REASON NOT TO IMPOSE THE DEATH PENALTY, THAT UNDER STATE LAW THE JURY'S SENTENCING ALTERNATIVE OF "LIFE IMPRISONMENT" MEANS LIFE WITHOUT THE POSSIBILITY OF PAROLE?

2.

DID THE TRIAL COURT'S REFUSAL TO INFORM THE JURY THAT PETITIONER COULD NEVER BE PAROLED IF SENTENCED TO LIFE IMPRISONMENT VIOLATE HIS DUE PROCESS RIGHT TO REBUT THE PROSECUTION'S CASE FOR DEATH, WHERE THE STATE ARGUED THAT PETITIONER WOULD POSE A GRAVE RISK OF FUTURE VIOLENCE UNLESS HE WAS EXECUTED, AND WHERE THE JURY SPECIFICALLY ASKED ABOUT THE POSSIBILITY OF PAROLE?

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Petitioner Jonathan Dale Simmons prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina, together with the dissenting opinion of Justice Finney, is reported as State v. Simmons, 427 S.E.2d 175 (S.C. 1993), and is reprinted in the Appendix to this petition at A-1 through A-6. The order of the South Carolina Supreme Court denying rehearing is unreported, and is reprinted infra at A-7.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 1, 1993. A timely petition for rehearing was denied on March 10, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the eighth amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

2. It also involves the fourteenth amendment to the Constitution of the United States, which provides in pertinent part:

[N]or shall any state deprive any person of life . . .

without due process of law ... .

3. It also involves S.C. Code §§ 16-3-10 et seq. (1991 Cum. Supp.), which code sections are reprinted in the Appendix to this petition at A-8 through A-14.

4. It also involves S.C. Code § 24-21-640 (1991 Cum. Supp.), which provides in pertinent part:

> The [South Carolina] board [of probation, parole and pardon] must not grant parole, nor is parole authorized, to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60. Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense.

5. It also involves S.C. Code Ann. § 16-1-60 (1991 Cum. Supp.), which provides in pertinent part:

> For purposes of definition under South Carolina law a violent crime includes the offenses of murder, criminal sexual conduct in the first and second degree . . . [and] burglary in the first degree . . . .

STATEMENT OF FACTS

The issue in this case is whether a death sentence may be carried out when it was imposed by a jury which lacked a crucial piece of information about its only noncapital sentencing alternative--namely, that "life imprisonment" meant life imprisonment without eligibility for parole. The issue arose in the following way.

A. South Carolina adopts life without parole.

During 1985 and 1986, responding to intense public concern

about violent crime, the South Carolina General Assembly took up a comprehensive set of criminal justice reform proposals. 1985 S.C. Senate J. 1316. Included among these was a proposal to abolish parole for life term inmates who had been convicted of murder with aggravating circumstances.

This life-without-parole proposal initially passed the state House of Representatives, but encountered vociferous opposition from law enforcement officials and prosecutors who feared that such a sentencing alternative would encourage juries not to impose the death penalty in capital cases.[1] Prosecutors insisted that providing juries with a life-without-parole option "'objectively, over the long haul,' would do away with the death penalty."[2] At the same time, a coalition of high-ranking state law enforcement officials asserted in a letter to the legislature that enacting a life-without-parole sentence "will increase the risk of major crime by encouraging juries to refrain from applying the existing death penalty."[3] Based largely on these views, the state Senate voted

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[1]One state senator summed up the views of those opposing life without parole during debate on the Senate floor: "[I]f we pass [life without parole], let's close the death house . . . [and] transfer the chair to the state museum." This senator explained that "a juror considering the death penalty will think, 'I can put that person away forever, and my conscience will be clear.'" G. Rigsby, "Senate OKs amended crime bill," The State (Columbia, S.C.), March 20, 1986, at 8C.

[2]D. Kern, "Anders argues against life without parole," The State (Columbia, S.C.), March 16, 1986, at 4B.

[3]Associated Press, "Crime bill stalemate continues," The State (Columbia, S.C.), May 1, 1986, at 12C. A leading South Carolina victims' rights advocate and supporter of the life-without-parole

to delete life without parole from the anti-crime legislative proposal. 1986 S.C. Senate J. 1071, 1079.

The House, however, refused to accept the Senate's rejection of life without parole, and the crime bill languished in conference committee. As positions on both sides hardened, state representative Jean H. Toal, a House leader on the crime bill, proposed a way out of the legislative impasse. Rep. Toal argued that jury decisions in capital cases would not be affected by the no-parole provision because trial judges would not let jurors know about it.

> Mrs. Toal said she disagrees with people who say death[sic] without parole would make the death penalty obsolete.
>
> Judges would not permit juries to be told anything about a prisoner's chances for serving life or being paroled, she said.
>
> Ms. Toal said juries would continue to consider a penalty based on the heinous nature of a crime, rather than the possibility of parole.[4]

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option implicitly acknowledged the truth of the prosecutors' assessment of the impact of life without parole on the sentencing behavior of capital juries, but argued for adoption of the no-parole measure:

> "Some prosecutors think they have a better chance of getting the death penalty (for a criminal) if the only other option is life (with a chance for parole [in] 20 years)," Rossi said. "I'm more concerned about the times that we don't get it (the death penalty) and the violent criminal is released back on the streets."

D. Kern, "Anders argues against life without parole," supra (quoting Ray Rossi, President, Citizens Against Violent Crime).

[4]D. Kern, "House, Senate deadlocked on crime bill," The State (Columbia, S.C.), March 27, 1986, at 1C (emphasis added).

Ultimately, the state legislature agreed to a compromise under which aggravated murders would be punishable by life imprisonment without eligibility for parole for a minimum of 30 years, and sentences of life without possibility of parole would be reserved for offenders with prior convictions for violent crimes. See 1986 S.C. Acts 2983, 2990; S.C. Code §§16-3-20(A), 24-21-640 (1991 Cum. Supp.).

Representative Toal's prediction that these limitations on parole eligibility would be withheld from capital sentencing juries was briefly proven wrong, as the South Carolina Supreme Court ruled that capital defendants were entitled upon request to a jury instruction concerning the newly-enacted restrictions. State v. Atkins, 293 S.C. 294, 360 S.E.2d 302, 305-306 (1987). However, after Representative Toal was herself elected by the legislature to the state supreme court, the court reversed itself. In State v. Torrence, the state supreme court expressly overruled Atkins, and held that jury instructions should not include any specific information about parole ineligibility, but should simply direct juries to interpret the term life imprisonment "in its plain and ordinary meaning." 305 S.C. 45, 406 S.E.2d 315, 320 (1991) (Chandler, J., concurring, for a majority of the court). A month after South Carolina abandoned in Torrence the practice of providing full information to capital sentencing juries concerning the parole ineligibility of convicted murderers, petitioner's

capital sentencing hearing began.[5]

B. How petitioner came to be ineligible for parole.

Petitioner was indicted in a Richland County, South Carolina state court for the July 1990 beating death of an elderly woman, Ms. Josie Lamb, during a burglary at Ms. Lamb's home. Arrested the day after the murder, petitioner confessed to killing Ms. Lamb and to a series of break-ins and sexual assaults against several other elderly women committed over a one-year period. The week before his capital murder trial was to begin, petitioner pled guilty to first degree burglary and two counts of criminal sexual conduct in connection with two unrelated assaults on elderly women which occurred in August 1989 and June 1990.

Under the 1986 amendments to South Carolina's parole statutes discussed above, these prior convictions for three violent offenses rendered petitioner ineligible for parole consideration in connection with any sentence imposed for any subsequent conviction for a violent offense--including the murder of Ms. Lamb. S.C. Code § 24-23-640 (1991 Cum. Supp.); State v. Torrence, 406 S.E.2d at 320. South Carolina law authorizes only death and life imprisonment as punishments for murder. S.C. Code Ann. § 16-3-20(A) (1991 Cum. Supp.). Therefore, the only noncapital sentence that petitioner could receive upon conviction for the murder charge was life imprisonment without possibility of parole.

C. How parole eligibility was raised by the evidence but withheld from the jury.

The prosecutor seems to have recognized the critical significance of petitioner's parole ineligibility in the determination of the sentence, for he advised the trial judge, before the start of jury selection, that the state was "obviously going to ask [the court] to exclude any mention of parole throughout this trial." State v. Simmons, Transcript of Record at 210 [hereinafter cited as "Tr."]. The prosecutor moved for an order prohibiting the defense from asking prospective jurors any voir dire questions regarding the entire subject of parole. Tr. 217.

This motion was granted over petitioner's objection. Tr. 218-22.[6] As a result of this ruling, the defense was not permitted to question prospective jurors as to whether they harbored fixed preconceptions about parole eligibility and the actual meaning of a "life" sentence under South Carolina law, or whether they could disregard any such preconceptions and be guided instead only by the

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[5]Noting that then-Representative Toal's assurances concerning how the courts would treat petitioner's present claim may well have helped to break the 1986 House/Senate deadlock and led to enactment of the no-parole statute at issue, petitioner moved that Justice Toal recuse herself from participating in his direct appeal. The state opposed this motion. The state court summarily denied it. State v. Simmons, Letter Order dated September 24, 1992. Justice Toal ultimately voted with the majority in affirming petitioner's death sentence.

[6]The court relied on State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988), cert. denied, 489 U.S. 1091 (1989), in which the South Carolina Supreme Court rejected a capital defendant's claim that he was constitutionally entitled to apprise the jury of restrictions on his eligibility for parole.

instructions of the court.[7]

The jury selected on the basis of this restricted voir dire then heard evidence tending to establish that the murder of Josie Lamb was one of a series of brutal attacks upon elderly women--including petitioner's own grandmother--that stretched over a fourteen month period ending with petitioner's arrest the day after Ms. Lamb's death. The state presented this evidence during both the guilt and sentencing phases of petitioner's trial. At the latter phase, the defense responded with mitigating evidence tending to show that petitioner's violent behavior stemmed from serious mental disorders, which were in part the product of many years of neglect and extreme sexual and physical abuse during his childhood and adolescence.

Although the state disputed the reliability of much of the information underlying petitioner's claim of mental disorder, both the state's case for death and petitioner's case for life had in common the recognition that petitioner posed a severe and continuing danger to elderly women. Indeed, the prosecutor made petitioner's admitted dangerousness the core of the state's appeal for a death sentence. He argued that the jury's sentencing verdict "should be a response of society to someone who is a threat," and

[7]The trial judge did define the term "death penalty" for the jury venire by advising the prospective jurors in his introductory remarks that "[b]y death penalty, we mean death by electrocution." Tr. 157. At no point during the proceedings, however, did the judge (or anyone else) inform the jury that "life imprisonment" meant imprisonment for life without possibility of parole.

repeatedly asserted that the jury's decision to sentence petitioner to death "will be an act of self-defense." Tr. 2056, 2064-65.

Petitioner's attempt to meet this "future dangerousness" line of attack consisted of two interrelated parts. First, he sought to show that his violent adult behavior was confined to attacks on elderly women, and that there was no reason to expect further acts of violence once he was isolated in a prison setting. Tr. 2074-75. This was inferentially supported by the testimony of a number of witnesses who had known petitioner in the community prior to the crimes, and who generally indicated that they found violence to be out of character. Tr. 1685-86, 1694-95, 1941-43, 1945, 1947, 1950.

Second, petitioner introduced evidence tending to establish that he would make a well-behaved and nonviolent inmate if he was sentenced to life imprisonment.[8] This evidence included testimony from a female medical assistant and from two supervising officers at the Richland County jail to the effect that petitioner had adapted well to prison life during pretrial confinement. Tr. 1959-61, 1974-75. In addition, petitioner offered expert opinion testimony from a clinical social worker and former correctional employee, Richard L. Boyle, who had both reviewed and observed petitioner's institutional adjustment. Mr. Boyle expressed the view, based on his assessment of petitioner's background and of his

[8]South Carolina declared such "adaptability" evidence irrelevant and inadmissible in State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), but has been required to admit it since this Court's decision in Skipper v. South Carolina, 476 U.S. 1 (1986).

current functioning, that petitioner could and would successfully adapt to prison should he be sentenced to life imprisonment. Tr. 1878-80.

In sum, petitioner's response to the state's future dangerousness argument was that he would not be dangerous so long as he was in prison. Since this line of defense was predicated on the fact that petitioner was legally ineligible for parole and would therefore actually remain in prison if given a life sentence, petitioner asked the trial judge so to instruct the jury in accordance with S.C. Code § 24-21-640. Tr. 1585-86; Defendant's Request to Charge No. 3, Tr. 2332-33.

In support of his request for an accurate instruction on his parole ineligibility, petitioner proffered outside the presence of the jury evidence that he would not be considered for parole if the jury sentenced him to life imprisonment. Attorneys for the South Carolina Department of Corrections and the Department of Probation, Parole and Pardons confirmed under oath that any offender in petitioner's position was in fact ineligible for parole under South Carolina law. Tr. 1574-83. The prosecutor did not question petitioner's ineligibility for parole. He did cross-examine the attorney for the Department of Corrections in an attempt to suggest that petitioner might receive holiday furloughs or other forms of early release. However, this cross-examination succeeded in establishing only that Department of Corrections regulations would further prohibit petitioner's release under early-release programs

such as work-release or supervised furloughs, and that no convicted murderer serving a life-without-parole sentence had ever been furloughed for any reason. Tr. 1576-79.[9]

In addition, petitioner offered and the trial judge admitted without objection the results of a scientific statewide public opinion survey conducted by the University of South Carolina's Institute for Public Affairs a few days before petitioner's trial. This survey showed that nearly half of all jury-eligible[10] adults questioned believed that a convicted murderer sentenced to life imprisonment in South Carolina could expect to be released from prison in less than twenty years; nearly three-quarters believed that release would occur after less than thirty years. Court's Exhibit 11, Table 2; Tr. 2327. By contrast, only 7.1 percent of those surveyed firmly believed that a life-sentenced inmate would

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[9]The prosecutor did not attempt to explore the possible effect of gubernatorial commutation on life-without-parole inmates, since South Carolina is one of the few states which does not allow the governor to commute prison sentences. S.C. const. art. IV, § 14 (1976) (commutation power extends to death sentences only); Julian H. Wright, Jr., Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?, 43 Vanderbilt L. Rev. 529, 550 n. 141 (1990) (listing South Carolina and Alabama as the only death penalty states where "a murderer [can] be put behind bars with no potential release mechanisms of any kind under a life-without-parole sentence"). Cf. California v. Ramos, 463 U.S. 992 (1983).

[10]To ensure that the sample was representative of potential jurors who were actually eligible to serve on capital juries, the poll ascertained whether each respondent's opinion concerning the death penalty depended upon the circumstances of each case. As a result, the sample was effectively "death-qualified" and "life-qualified" in a way roughly equivalent to the jury selection process in South Carolina capital cases.

actually have to spend the rest of his life in prison. Id.[11] Finally, more than three-quarters of those surveyed stated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murderer would actually have to serve in prison would be an "extremely important" or "very important" factor in their own choice between life and death. Table 3, Tr. 2328.

Based on this public opinion polling data, and on the evidence already before the jury concerning petitioner's history of violent behavior outside of prison, petitioner argued that fear of his possible release on parole would likely influence the jury's deliberations unless the court gave an accurate instruction as to the unavailability of parole in petitioner's particular case. Tr. 1597-1600. After considerable discussion, the trial judge concurred with the prosecution's position and refused the requested instruction, citing the state supreme court's then-recent decision in State v. Torrence. Tr. 1601-07.

Having failed in his efforts to have the trial judge provide the jury with accurate information concerning his ineligibility for parole, petitioner requested in the alternative that the judge give the following instruction:

> I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that the defendant be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.
>
> In your deliberations, you are not to speculate that these sentences mean anything different from what I have just told you, for what I have told you is exactly what will happen to the defendant, depending on what your sentencing decision is.

Defendant's Request to Charge No. G, Tr. 2239. The trial judge refused this instruction, but stated that he would give a somewhat similar instruction if and when the jury inquired about petitioner's parole eligibility. Tr. 1607, 2038.

Following these rulings, the prosecutor successfully moved to prohibit defense counsel from "making any representations to the jury as to what [a life] sentence may or may not mean." Tr. 1649-50.[12] As a result, the defense arguments contained nothing from which the jury might have inferred that petitioner would be ineligible for parole if sentenced to life imprisonment.

Petitioner's attempt to limit the prosecutor's jury argument was less successful, however. Asserting that the trial court's refusal of his requested parole instruction made it impossible for him to meet the state's future dangerousness claim, petitioner

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[11]When first asked whether life-sentenced inmates could be considered for release, 20 percent of the sample said no. However, when asked to specify how long a life-sentenced murderer would have to serve, only 7.1 percent gave "life."

[12]The prosecutor based his motion upon State v. Stewart, in which the South Carolina Supreme Court criticized a defense attorney for inaccurately assuring the jury that his client would "be in jail for his entire life" if sentenced to life imprisonment. 283 S.C. 104, 320 S.E.2d 447, 451 (1984). The Stewart court characterized defense counsel's assertion as "patently misleading and improper" because the defendant would actually have been eligible for parole in 20 years.

moved in limine that the prosecutor be prohibited "from arguing or implying that the defendant will pose a risk of future violent behavior unless sentenced to death," and cited as authority Gardner v. Florida, 430 U.S. 349 (1977). Tr. 1648.

The trial judge denied petitioner's motion: although cautioning the prosecutor to confine his argument to the record, he explicitly upheld "the right of the state to argue the defendant's dangerous propensity." Tr. 1649. As noted earlier, the prosecutor made full use of this right in his penalty phase summation. He reminded the jury that even "[petitioner's] own psychologist Dr. Evans testified he is dangerous," Tr. 2056; he characterized the issue as "what to do with [petitioner] now that he is in our midst," Tr. 2065; and he repeatedly described the jury's decision for death as a simple matter of "self-defense." Tr. 2064, 2066.

After deliberating on petitioner's sentence for some 90 minutes, the jury sent out the following note:

JUNE 30, 1991

JUDGE ANDERSON,

DOES THE IMPOSITION OF A LIFE SENTENCE CARRY WITH IT THE POSSIBILITY OF PAROLE?

s/JAMES E. WRIGHT
JURY FOREPERSON

Tr. 2344. The jury returned to the courtroom where, over petitioner's objection, the trial judge gave this instruction:

> Mr. Foreman, I received the note and I respond as follows: Mr. Foreman and members of the jury, please, please, give me your attention. You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

Tr. 2106. Twenty-five minutes after having its question about parole answered in this fashion, the jury returned to the courtroom with a sentence of death. Tr. 2108-09.

D. The state supreme court's disposition of petitioner's parole ineligibility claim.

On appeal to the South Carolina Supreme Court, petitioner argued that concealment from the jury of his parole ineligibility violated the federal constitution in three separate ways. First, he contended that parole ineligibility was "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986), (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)). Therefore, he was entitled to have the jury informed of his ineligibility under well-established eighth amendment principles. McCleskey v. Kemp, 481 U.S. 279, 306 (1987) (states may not constitutionally exclude from capital sentencing process "any relevant circumstances that could cause [the sentencer] to decline to impose the [death] penalty . . . and any relevant information offered by the defendant").

Second, relying on Beck v. Alabama, 447 U.S. 625 (1980), he asserted that by withholding from the jury the life-without-parole sentencing alternative that state law actually provided, the trial

court had impermissibly diminished the reliability of the jury's determination that death was the appropriate punishment.

And third, citing Gardner v. Florida, 430 U.S. 349 (1977), he argued that his due process right to rebut the state's affirmative case for death had been denied by the trial court's refusal to permit him to show that a noncapital sentence could adequately protect society from any future acts of violence by him. This was true because, on the particular facts of his case, the life imprisonment option included no possibility of release on parole.

The state court noted but declined to address petitioner's eighth amendment and due process claims. Instead, over Justice Finney's dissent, the court ruled that the trial judge's belated parole instruction, given in response to the jury's mid-deliberation inquiry, "satisfies in substance appellant's request for a charge on parole ineligibility." State v. Simmons, 427 S.E.2d at 179. Significantly, the state court did not disagree with petitioner's submission concerning the importance of his parole ineligibility in the jury's sentencing deliberations. Nor did it suggest that the first part of the trial judge's supplemental instruction--in which he admonished the jury not to consider parole or parole eligibility--actually sufficed to remove that issue from the case.[13] Instead, the state supreme court majority simply

[13]Any such suggestion would have been contradicted by the state court's own precedent. In State v. Smith, 298 S.C. 482, 381 S.E.2d 724 (1989), cert. denied, 494 U.S. 1060 (1990), the state supreme court candidly acknowledged the ineffectiveness of similar cautionary instructions in response to jury inquiries about parole.

asserted that "a reasonable juror would have understood" the trial judge's "plain meaning" instruction as signifying "that life imprisonment indeed meant life without parole." Id.

Petitioner sought rehearing, pointing out that the jury had sentenced petitioner to death almost immediately after hearing the "plain meaning" instruction, that the instruction encouraged the jury to rely on the widely held but (in this case) incorrect perception that life term inmates are eventually eligible for parole, and that the admonition "not to consider parole or parole eligibility" inaccurately suggested that parole was a possibility in petitioner's case. Petitioner also asserted that the state court had apparently failed to consider petitioner's evidentiary showing concerning the high level of misinformation among the jury-eligible public on this issue, the refusal of the trial judge to

The Smith court explained two recent South Carolina decisions on the point as follows:

> In [State v.] Johnson, [293 S.C. 321, 360 S.E.2d 317 (1987)], the trial court charged the jury that "the possibility of parole is of no concern of yours"; in [State v.] Plemmons, [296 S.C. 76, 370 S.E.2d 871 (1988)], the trial court instructed jurors that "you are not to concern yourself with that [parole]." . . . The Johnson and Plemmons juries, instructed only that parole was not their concern, would have logically inferred that parole was someone else's concern. Simply put, those juries were practically invited to speculate about parole eligibility.

381 S.E.2d at 727 (emphasis in original). For a review of the evolution of South Carolina law governing parole consideration by capital sentencing juries prior to the advent of life without possibility of parole, see James M. Hughes, Informing South Carolina Juries About Parole, 44 S.C. L. Rev. ____ (Winter, 1993).

permit voir dire questioning of prospective jurors in order to uncover any preconceptions concerning the parole eligibility of convicted murderers, and the evidence in petitioner's case which would have caused the jury to entertain especially grave concerns about his possible release on parole. The state court denied rehearing by a four-to-one vote. Infra at A-7.

WHY THE WRIT SHOULD BE GRANTED

In California v. Ramos, 463 U.S. 992 (1983), the Court noted that many states prohibit capital sentencing juries from considering the availability of parole, pardon or commutation. 463 U.S., at 1013 n. 30. The purpose of these state law rules was to protect capital defendants from jury speculation concerning the likelihood of early parole release if the death penalty was not imposed.[14] In recent years, however, with the steady expansion of "life without parole" statutes,[15] parole for life-sentenced murderers has increasingly moved from a real possibility to a jury-room myth, unfounded in reality but ever-present in the deliberations of capital sentencing juries. And with this change, rules that once protected capital defendants from potentially harmful speculation can now serve to increase the danger of death sentences based on little more than jurors' misinformed fear of parole release.

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[14] See generally, W.E. Shipley, Annot., Prejudicial Effect of Statement or Instruction of Court as to Possibility of Parole or Pardon, 12 A.L.R.3d 832 (1967).

[15] See generally, Wright, supra, note 9, at 540-47 (describing and classifying various state life-with-parole statutory schemes).

This case illustrates in stark form the unfairness that results when the crucial fact of a defendant's lifelong parole ineligibility is withheld from the jury which must sentence him. The constitutionality of this mischievous practice is a question upon which the highest courts of several states are divided. compare Bruce v. State, 569 A.2d 1254 (Md. 1990); Turner v. State, 573 So.2d 657 (Miss. 1990); and State v. Henderson, 109 N.M. 655, 789 P.2d 603 (1990) (all holding that capital defendant's parole ineligibility may not constitutionally be withheld from sentencing jury); with Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929, 941 (1990), cert. denied, 111 S.Ct. 1338 (1991); and Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361 (1987) (both holding unavailability of parole irrelevant to jury's capital sentencing decision). Because of this division, and because the question is one of great importance to the administration of the states' capital sentencing statutes, petitioner submits that the Court should grant certiorari to resolve it.

A. THE TRIAL JUDGE'S "PLAIN MEANING" INSTRUCTION DID NOT ADEQUATELY PROTECT PETITIONER'S RIGHT TO A FAIR SENTENCING DETERMINATION

Before addressing the eighth amendment and due process issues presented by this case, petitioner would like to discuss the state supreme court's effort to avoid his constitutional claims by recasting the trial court's confusing and evasive response to the jury's parole question as the equivalent of an accurate no-parole instruction. With all due respect to the South Carolina Supreme

Court, it was wrong to think that the trial court's ambiguous "plain meaning" charge provided a satisfactory substitute for an accurate instruction. At a minimum, there is at least a "reasonable likelihood" that the jury did not understand the judge's "plain meaning" instruction as precluding the possibility of petitioner's release on parole. Boyde v. California, 494 U.S. 370, 380 (1990). This is so for several reasons.

First, the initial part of the judge's statement ("you are not to consider parole" and "[parole is] not a proper issue for your consideration") actually suggested that a life sentence did carry the possibility of parole, but that the jury should let some other authority concern itself with that fact. As the South Carolina Supreme Court has itself acknowledged, this is the natural interpretation. State v. Smith, 298 S.C. 482, 381 S.E.2d 724 (1989), cert. denied, 494 U.S. 1060 (1990).[16]

As for the instruction upon which the South Carolina Supreme Court did rely--that the jury was to understand the term life imprisonment in its "plain and ordinary meaning"--the effectiveness of the charge obviously depended on whether, to the jurors who heard it, the "plain and ordinary meaning" of the term "life imprisonment" was life without possibility of parole. There is no reason, however, to believe that the jurors who sentenced petitioner to death understood the term "life imprisonment" in this way. There is substantial reason to think otherwise. State v. Smith,

[16]See n. 13 supra.

381 S.E.2d at 728 (Chandler, J., dissenting) ("the reality, known to the 'reasonable juror,' [is] that, historically, life term defendants have been eligible for parole").

Of course, because the prosecution successfully prevailed upon the trial judge to prohibit any voir dire inquiry into the matter, the record cannot show for certain exactly what the jurors thought on this question. Cf. State v. Henderson, 109 N.M. 655, 658, 789 P.2d 603, 606 (1990) (voir dire statements of jurors which revealed their erroneous beliefs about capital defendant's eligibility for parole showed need for accurate parole instruction).

On the other hand, petitioner's statewide public opinion poll established that for the large majority of jury-eligible South Carolinians, "life" imprisonment means not only the possibility that a murderer will be released after a period of years, but the probability that he will be.[17] Because the likelihood of parole

[17]The reliability of petitioner's poll was unchallenged below. The fact that numerous surveys throughout the nation have produced similar results strongly supports its conclusions. See, e.g., Frank A. Bennack, Jr., The Public, the Media and the Judicial System, 7 State Ct. J. 4, 10 (1983) (70 percent of Americans in national survey believed that criminal sentenced to "life imprisonment" would not spend rest of life in prison); William J. Bowers, Capital Punishment & Contemporary Values: People's Misgivings and the Court's Misperceptions, 27 Law & Soc. Rev. 157, ___ (1993) (summarizing recent survey data from Florida, Georgia, Nebraska, New York and South Carolina, and concluding that "both citizen and juror grossly underestimate the time that will usually be served by murderers not sentenced to death"); Anthony Paduano & Clive Stafford Smith, Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Columbia Human Rights L. Rev. 211, 222 n. 33 (1987) (randomly selected capital jury veniremen in Cobb County, Georgia believed, on average, that "life sentence" meant imprisonment for 8.1 years); id. 223-225 n. 35 (summarizing results of county-wide survey in Georgia and of

release is so widely assumed--and exaggerated--there is no support for the state supreme court's conclusion.

The record does show, of course, that the jury was concerned enough about the subject to ask for further instructions: this fact alone casts some doubt on whether the jurors' understanding of the "plain meaning" of life imprisonment necessarily excluded the possibility of parole. And it would not have been unreasonable for the jurors to wonder why, if state law actually barred petitioner from parole consideration, the trial judge would not have answered the jury's straightforward question with an equally clear and simple statement.

Finally, the "plain meaning" instruction came too late. Although the state court's opinion neglects to mention this fact, the record shows that the judge's belated instruction was followed by a death sentence within a few minutes. A fair reading of this

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jury venire survey in Mississippi that both showed that estimates of anticipated "life sentence" duration averaged ten years or less); William W. Hood, III, The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing, 75 Va. L. Rev. 1605, 1624 n. 101 (1989) (median estimate by jury-eligible residents of Prince Edward County, Virginia of time that capital murderer would actually spend in prison on "life imprisonment" sentence was 10 years); Marshall Dayan et al., Searching for an Impartial Sentencer Through Jury Selection in Capital Trials, 23 Loy. L.A. L. Rev. 151, 171 (1989) (post-trial interviews of 30 Maryland capital jurors showed that half believed life term inmates would typically serve no more than 10-15 years in prison). That the public's understanding of the meaning of a "life sentence" includes eventual parole release is inferentially supported by other national and local surveys that show that Americans' support for capital punishment drops sharply when an alternative sentence which includes life without parole is offered. Joe Davidson, Death Penalty Support Found Not Firm, Wall St. J., Apr. 19, 1993, at B2.

record is that the jury had focused its attention on the possibility of petitioner's release on parole before it returned to the courtroom to ask about it, and the judge's unnecessarily evasive response simply sealed petitioner's fate.

In sum, the record does not support the state supreme court's conclusion that the "plain meaning" instruction served as an adequate substitute for a straightforward "no" in response to the jury's question about whether petitioner would be eligible for parole if sentenced to life imprisonment. The state supreme court's opinion notwithstanding, this case thus squarely presents the question of whether South Carolina's refusal to provide this crucial information to the capital sentencing authority violates the federal constitution. For the reasons which follow, petitioner submits that that question must be answered in the affirmative.

B. THE EIGHTH AMENDMENT ENTITLES A CAPITAL DEFENDANT TO HAVE THE SENTENCING JURY INFORMED OF HIS INELIGIBILITY FOR PAROLE UNDER STATE LAW.

The right to have the capital sentencing jury accurately informed of the meaning of its "life imprisonment" alternative stems from the eighth amendment's bar against arbitrary and capricious infliction of the death penalty. As the joint opinion of Justices Stewart, Powell and Stevens put the matter in Gregg v. Georgia,

> [i]f an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational

> sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never have made a sentencing decision.

428 U.S. 153, 190 (1976).

Since Gregg, the Court has implemented this fundamental constitutional principle in three interrelated ways:

> (1) by prohibiting procedures which needlessly undermine the reliability of the capital sentencing process, e.g., Beck v. Alabama, 447 U.S. 625 (1980); Caldwell v. Mississippi, 472 U.S. 320 (1985);
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> (2) by requiring that the sentencing authority consider all relevant evidence why death should not be imposed in a particular case, Lockett v. Ohio, 438 U.S. 586 (1978); Skipper v. South Carolina, 476 U.S. 1 (1986); and
>
> (3) by setting aside death sentences whenever the defendant has been deprived of a fair opportunity to rebut the prosecution's case for death, Gardner v. Florida, 430 U.S. 349 (1977).

What happened here violated this Court's precedents in each of these three areas.

1. Reliability

"The fundamental respect for humanity underlying the eighth amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (citations and internal quotation marks omitted). The withholding of the defendant's lifelong parole ineligibility from a jury which must sentence him either to death or to "life imprisonment" offends this principle. Because it distorts the jury's view of both the incapacitative and

retributive effect of the noncapital sentencing alternative, there is the needless risk that the jury will impose the death penalty simply to eliminate what is in reality a nonexistent danger of release on parole.

Where this record shows the risk of error most clearly is in the jury's exercise of its incapacitative judgment. Given the graphic and undeniably shocking evidence of petitioner's repeated attacks on elderly women, no responsible juror could avoid the question, "If I vote to spare his life, what then?" As a matter of simple common sense, the answer to this question depended in large part on whether petitioner would be securely imprisoned for the rest of his life, or whether he might be released on parole. See California v. Ramos, 463 U.S. at 1002-09 (noting relevance of possible gubernatorial commutation of sentence of "life without possibility of parole" to issue of defendant's possible future dangerousness).[18]

By withholding the answer which state law actually provided, the trial court permitted the jury to sentence petitioner while laboring under a fear arising from an impossibility--a fear which, though groundless in fact, was surely powerful enough to overcome any mitigating considerations. This Court's decisions have frequently recognized the importance of such predictions of future conduct in the capital sentencing process. Jurek v. Texas, 428

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[18]As noted above, supra at n.9, the precise issue addressed in Ramos could not arise under South Carolina law, since the governor may not commute a prison sentence.

U.S. 262 (1976); California v. Ramos; Barefoot v. Estelle, 463 U.S. 880 (1983). It would defy logic to suppose that a jury entrusted with the highly subjective and discretionary decision of whether to take or spare the life of a defendant such as this petitioner would be unaffected by the possibility of his being loosed upon society at some point in the future.

The withholding of such important information about the severity of the available life imprisonment option also impaired the jury's retributive judgment. Life without parole is a much harsher punishment than life with the possibility of parole release. See generally Harmelin v. Michigan, 111 S.Ct. 2680 (1991). Simply put, a jury's decision between life and death might well turn on the extent to which the severity of the particular form of "life" imprisonment corresponds to the grievousness of the crime which the defendant committed. A capital sentencing jury must make a retributive judgment, and it will make that judgment whether it is given accurate information or forced to rely on uninformed speculation. In a matter so necessarily imprecise and so governed by jurors' subjective emotions, any perception of unwarranted leniency will have its effect, and so it did in this case.

Nearly two decades before Gregg, the New Jersey Supreme Court observed, "That death should be inflicted when a life sentence is appropriate is an abhorrent thought." State v. White, 142 A.2d 65, 76 (N.J. 1958). Construing its own state law to prohibit death sentencing based on speculation concerning parole release, the

White court concluded, "The Legislature could not have intended that juries shall weigh the death penalty against something less than a life sentence, and by that process arrive at a punishment which does not fit the facts." Id.

As petitioner has pointed out, supra at 2-6, there is some reason to believe that the South Carolina legislature did intend precisely this mischievous result when it adopted its life-without-parole recidivist statute in 1986. But whether what happened in this case occurred by legislative design or judicial mistake, it plainly created a constitutionally unacceptable risk that petitioner's death sentence was the product of the jury's groundless fear of his premature release on parole, rather than of the evidence presented.

Beck v. Alabama, 447 U.S. 625 (1980), is analogous. In Beck, the Court struck down a portion of Alabama's death penalty statute which precluded the jury from considering lesser included offenses of capital murder. The Beck Court recognized that where the evidence would have supported a conviction for a lesser included offense, the "preclusion" clause created an unacceptable risk that the jury might convict the defendant of the greater offense only because the law provided no alternative but outright acquittal, rather than because the evidence actually warranted such a conviction. Like the preclusion clause involved in Beck, the trial judge's refusal here to give a clear and comprehensible explanation of the jury's life imprisonment option "enhance[d] the risk of an

unwarranted [death sentence]. " Id., 447 U.S. at 638. It needlessly pressured the jurors to err on the side of severity, and to impose death simply to foreclose the (illusory) possibility of petitioner's early release, rather than because a death sentence was actually warranted by the evidence. This injection of extraneous and prejudicial considerations into the jury's deliberations "tended to diminish the reliability of the sentencing determination." Id. Here and "in every case [it] introduce[s] a level of uncertainty and unreliability that cannot be tolerated in a capital case." Id. at 643.

2. The right to present mitigating evidence

"When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process." Walton v. Arizona, 497 U.S. 639, 653 (1990). In this case, a critical "facet of the sentencing process" about which the jury was not instructed was the meaning and effect of the jury's noncapital alterative of life imprisonment. Because this information provided a reason why the jury might have found the death penalty inappropriate in petitioner's case, and also because without it the jury could not accurately assess the weight to be accorded the other aggravating and mitigating evidence in the case, the withholding of petitioner's parole ineligibility violated the well-established eighth amendment requirement that capital sentencing authority consider "any relevant circumstances that could cause it to decline to impose the [death] penalty . . . and any relevant

information offered by the defendant." McCleskey v. Kemp, 481 U.S. at 306; Lockett v. Ohio.

The South Carolina Supreme Court has cited this Court's decision in California v. Ramos as support for its view that withholding a capital defendant's parole ineligibility from a sentencing jury raises no federal constitutional issue. See, e.g, State v. Patterson, 299 S.C. 280, 384 S.E.2d 699, 702-03 (1989), vacated on other grounds, 493 U.S. 1013 (1990), vacated on other grounds after remand, 111 S.Ct. 2913 (1991). Ramos, however, is not contrary to petitioner's claim. In upholding against eighth amendment challenge California's decision to provide sentencing juries with accurate information concerning the governor's power to commute a life-without-parole sentence, the Ramos Court noted the "elementary" fact that states remained free to prohibit consideration of defendants' parole eligibility as a means of providing "greater protections in their criminal justice system than the Federal Constitution requires." 463 U.S. at 1013-14 (emphasis added). But given the Court's emphasis on the accuracy of the challenged commutation instruction, id. at 1009, Ramos cannot fairly be read as authority for concealing crucially important sentencing information which, if known, might lead sentencing juries to choose life instead of death. See also Caldwell v. Mississippi, 472 U.S. at 341-43 (O'Connor, J., concurring).

South Carolina has sought to avoid the effect of the Lockett principle by declaring that a capital defendant's ineligibility for

parole is simply not a mitigating factor; therefore, it may be declared irrelevant to the sentencing process as a matter of state law. State v. Matthews, 296 S.C. 379, 373 S.E.2d 587, 592 (1988), cert. denied, 489 U.S. 1091 (1989); State v. Patterson, 384 S.E.2d at 702-03 (declaring that parole eligibility "is not mitigating evidence and is irrelevant to a defendant's adaptability to prison life," and asserting that whether to instruct on parole is a matter of state law only); State v. (William) Bell, 305 S.C. 11, 406 S.E.2d 165, 171 (1991) cert. denied, 112 S.Ct. 888 (1992); State v. Torrence, 406 S.E.2d at 323.

The flaw in this position is revealed by Skipper v. South Carolina, 476 U.S. 1 (1986), in which this Court rejected a similarly restrictive reading of Lockett in a slightly different context. In Skipper, the Court held that a capital sentencing authority may not be precluded from considering, as a mitigating factor, the likelihood that a convicted murderer would prove to be a cooperative and nonviolent prison inmate if sentenced to life imprisonment rather than to death. In so ruling, the Court noted that a capital defendant's likely future good behavior has no bearing on his culpability for the crime which he committed. 476 U.S. at 4. However, a defendant's future dangerousness or non-dangerousness has always been regarded as a relevant sentencing consideration. Jurek v. Texas, 428 U.S. 262 (1976); Barefoot v. Estelle, 463 U.S. 880 (1983). The Court held therefore that a defendant's likely future good behavior in prison is "'mitigating'

in the sense that [it] might serve 'as a basis for a sentence less than death.'" 476 U.S., at 4-5 (quoting Lockett v. Ohio, 438 U.S. at 604).

Skipper establishes that the constitutional meaning of the term "mitigating" is somewhat broader than simply that which lessens a defendant's moral blameworthiness. While considerations of moral culpability are certainly encompassed by this concept, see, e.g., Eddings v. Oklahoma, 451 U.S. 104 (1982) (defendant's violent childhood must be considered in mitigation), Skipper shows that evidence may have little or no relevance to a defendant's moral blameworthiness, and yet be "mitigating" under the eighth amendment principles of Lockett.[19]

Skipper concerned the exclusion of evidence, rather than the withholding of accurate legal information from the jury. But the Court would surely have reached the same result in Skipper if the information withheld from the jury in that case had been the fact that the defendant could never be considered for parole. A capital defendant's ineligibility for parole is a far more important

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[19]The Court has taken a correspondingly broad view of relevance in assessing the admissibility of evidence in aggravation, recognizing, for example, that a state may properly treat as relevant to a capital sentencing decision the full range of the harm caused by the murder, regardless of whether the murderer was fully aware of that harm when he acted. Payne v. Tennessee, 111 S.Ct. 2597 (1991). See generally Gregg v. Georgia, 428 U.S. at 203-04 (joint opinion of Stewart, Powell and Stevens, JJ.) ("So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information as possible when it makes the sentencing decision.").

determinant of whether he will pose an unreasonable risk of further violence than his pretrial behavior in jail. Similarly, the fact that a defendant can never be paroled may be expected to weigh much more heavily in a jury's deliberations than will the necessarily speculative predictions of future behavior involved in Skipper.[20] Thus it is plain that ineligibility for parole is, under the rationale of Skipper, a mitigating circumstance which cannot be constitutionally withheld from the sentencing jury when it is offered, as it was here, as a basis for a sentence of less than death. Lockett; Paduano & Smith, supra n. 17, at 238-44.

The Lockett facet of petitioner's claim does not depend, moreover, on whether the fact of his parole ineligibility is itself deemed a relevant mitigating factor. Rather, it is sufficient that the withholding of this information substantially impaired the jury's ability to assess the significance of other, indisputably relevant mitigating evidence.

The clearest example of this involves petitioner's effort to establish the likelihood of his future good behavior as a prison inmate. This evidence is unquestionably "relevant" within the meaning of Lockett. Skipper v. South Carolina. Yet, in this case, its weight was logically dependent on whether petitioner would in

[20]This is borne out both by the fact that petitioner's jury found the issue important enough to ask about during deliberations, and by petitioner's statewide survey, which showed that more than three-quarters of jury eligible respondents believed the amount of time a convicted murderer would actually have to serve in prison to be an "extremely important" or "very important" factor in a capital sentencing decision. Tr. 2328, Table 3.

fact remain in prison if the jury spared his life. See Franklin v. Lynaugh, 487 U.S. 164, 178 (1988) (construing Skipper as specifically concerned with capital defendant's right to prove his lack of future dangerousness in prison). Under these circumstances, petitioner's ineligibility for parole was the indispensable factual predicate for his Skipper evidence. By withholding that ineligibility from the jury, the trial judge unfairly minimized the significance which the jury would likely have accorded to petitioner's probable good behavior in prison.

Although states may provide a framework for the jury's consideration of mitigating factors, Franklin v. Lynaugh, id. at 179, there is no permissible state interest in constructing a framework which misleadingly minimizes the logical significance of the defendant's case for life. Withholding the simple truth about petitioner's parole ineligibility did exactly that. Therefore, it violated the rule of Lockett. Mills v. Maryland, 486 U.S. 367 (1988) (Lockett violated by jury instructions which might have impeded individual jurors' ability to give effect to mitigating factors); Penry v. Lynaugh, 492 U.S. 302 (1989); Hitchcock v. Dugger, 481 U.S. 393 (1987).

3. The right to rebut the state's case for death

The eighth amendment entitles a capital defendant to inform the sentencer that state law will keep the defendant in prison and protect society even if he is allowed to live. Even if it did not, due process nevertheless would have required such a no-parole

instruction under the circumstances of this case.

Petitioner has already detailed how the prosecution set out to persuade the jury that petitioner's execution was a practical necessity--"self-defense," as the prosecutor put it--if society was to be protected from future acts of violence. See supra at 8-9, 13-14. Petitioner responded that a less drastic but equally effective alternative did exist: the jury could sentence him to life imprisonment without possibility of parole. By denying petitioner the right to present this alternative, the trial judge violated "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" Skipper v. South Carolina, 476 U.S. at 5 n. 1 (quoting Gardner v. Florida, 430 U.S. at 362).

This one-sided presentation was inherently unfair. The unfairness was compounded, moreover, by the state's introduction of petitioner's record of prior violent offenses to show future dangerousness--the very record that rendered him permanently ineligible for parole. Thus while the prosecution was permitted to make unlimited use of these prior convictions as reasons to sentence petitioner to death, petitioner was barred from informing the jury of the fact that these same convictions operated to diminish substantially any threat of similar acts of violence by him in the future. See Ake v. Oklahoma, 470 U.S. 68, 86-87 (1985) (where state relied on psychiatric testimony to prove future dangerousness at capital sentencing hearing, denial of state funds for defense

psychiatrist violated due process).

It is no answer to petitioner's due process claim that the jury was (belatedly) instructed to disregard the question of parole. Quite apart from the fact that the state supreme court's opinion placed no reliance on the efficacy of this instruction to remove the subject of parole from the jury's deliberations, State v. Simmons, 427 S.E.2d 175, 179 (S.C. 1993), and that prior South Carolina decisions have expressly acknowledged its ineffectiveness, see State v. Smith, 298 S.C. 482, 381 S.E.2d 724, 727 (1989), even a showing that the jury did disregard the question of parole would not suffice. For once the prosecution had emphasized petitioner's alleged future dangerousness as a reason to sentence him to death, petitioner was entitled to have his ineligibility for parole affirmatively weighed in the balance as a factor tending to reduce the persuasiveness of the state's argument.

An additional facet of the due process violation which occurred in this case is revealed by Hicks v. Oklahoma, 447 U.S. 343 (1980). In Hicks, the Court struck down a 40-year sentence imposed by a jury because the trial judge, in violation of state law, had not instructed the jury that it could impose a substantially lesser sentence. Although jury sentencing is not in itself a constitutional right, Spaziano v. Florida, 468 U.S. 447 (1984), and although a properly instructed jury might well have imposed the same 40-year sentence upon Hicks, the Court held that the state had deprived him of his state-created liberty interest in having the

jury select his sentence from the full range of alternatives available under Oklahoma law.

The Fifth Circuit has succinctly summarized the holding of Hicks in terms especially applicable to the present case:

> [T]o establish a valid Hicks claim, the state criminal defendant must show . . . that the sentencing authority lacked knowledge and understanding of the range of sentencing discretion under state law . . . [and that] a substantial possibility exists that the sentencer, if properly informed, would have chosen one of these less severe sentencing options.

Dupuy v. Butler, 837 F.2d 699, 703 (5th Cir. 1988) (footnotes omitted). Here, of course, the sentencing option withheld from the jury was not, as in Hicks, the least severe alternative, but a "mid-range" sanction between death and life with parole. Under these circumstances, the likelihood of prejudice is all the greater, and the rationale of Hicks therefore applies with special force to this case.

C. PETITIONER'S REQUEST TO PROVIDE THE JURY WITH ACCURATE INFORMATION ABOUT HIS PAROLE INELIGIBILITY WOULD HAVE BEEN HONORED IN ALL BUT TWO OTHER COMPARABLE STATES.

Petitioner's constitutional claim is a narrow one. It does not call into question the general rule against consideration of parole eligibility, where capital defendants actually are eventually eligible for parole if not sentenced to death. See California v. Ramos, 463 U.S. at 1013 n. 30. Petitioner simply submits that where such eligibility does not exist as a matter of state law, rules designed to avoid speculation about whether and when parole

might actually be granted are no longer necessary, and must not be misapplied to permit the very evil which they were originally designed to prevent.

The practical effect of a ruling in petitioner's favor would also be relatively narrow. This is so because the capital sentencing procedures of most of the 23 capital jury-sentencing states which employ a life-without-parole alternative already comport with the constitutional principle invoked here.

In thirteen of these states, the jury is expressly informed of the defendant's ineligibility for parole by the terms of the sentencing verdict or recommendation itself.[21] In three additional

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[21]These thirteen jurisdictions may be subdivided into two subcategories: those which simply identify the jury's sentencing alternatives as death and life without parole, and those which allow the jury to specify whether a life sentence should be with or without parole eligibility. The nine states in the first category are **Alabama**, see Ala. Code §13A-5-46(e) (1982) (jury recommends either death or "life imprisonment without parole"); **Arkansas**, see Ark. Code Ann. 5-4-603(b) (Michie Supp. 1991) (jury may sentence to "life imprisonment without parole"); **California**, see Cal. Pen. Code 190.3 (West 1988) (trier of fact decides between death and a "term of life without the possibility of parole"), see also 1 California Jury Instructions, Criminal 8.84.2 (4th ed. 1979), (quoted in Boyde v. California, 494 U.S. 370, 374 (1990)); **Connecticut**, see Conn. Gen. Stat. §53a-46a(f) (West 1985) (verdict alternative to death is "life imprisonment without the possibility of release"); **Delaware**, see Del. Code Ann. tit. 11, 4209(a) (1987) (imprisonment for the remainder of defendant's natural life "without the benefit of probation or parole" is the only available verdict other than death); **Louisiana**, see La. Code Crim. Proc. Ann. art. 905.6 (West Supp. 1992) (jury returns sentencing verdict of death or "life imprisonment without benefit of probation, parole or suspension of sentence"); see also, Lowenfield v. Phelps, 484 U.S. 231, 235 (1988) (quoting jury instructions); **Missouri**, see, Mo. Ann. Stat. §565.020 (Vernon Supp. 1992) (jury's first degree murder sentencing alternatives are death or "imprisonment for life without eligibility for probation or parole, or release except by act of the governor"); **New Hampshire**, see N.H. Rev. Stat. Ann. §630:5 (IV)

states, statutory or decisional law requires that the sentencing jury be instructed that the defendant will be ineligible for parole, either in all cases, or where (as in petitioner's case) the defendant's prior criminal record precludes his parole consideration.[22] Two states, Utah and Florida, authorize life without

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(Supp. 1991) (jury determines whether death should be imposed rather than "life imprisonment without possibility of parole"); and **Washington**, see Wash. Rev. Code Ann. §10.95.030(1), 95.050 (West 1990) (jury chooses between death or "life imprisonment without possibility of release or parole").

The four states which allow the jury to specify whether the defendant should or should not be eligible for parole are **Maryland**, see Md. Ann. Code art. 27, §413(c)(3) (1987) (jury chooses between death, life imprisonment, or "imprisonment for life without the possibility of parole"); **Nevada**, see Nev. Rev. Stat. Ann. §175.161 (Michie 1986) (sentencing alternatives for first degree murder are death or life "with or without possibility of parole"); **Oklahoma**, see Okla. Stat. Ann. tit. 21, 701.10(A) (West 1992) (jury chooses between "death, life imprisonment without parole or life imprisonment"); and **Oregon**, see Or. Rev. Stat. §163.105 (1990) (jury's sentencing alternatives for aggravated murder are "death, life imprisonment without the possibility of release or parole or life imprisonment").

[22]Colorado capital sentencing juries must be instructed that life imprisonment means life without the possibility of parole. Colo. Rev. Stat. §16-11-103(1)(b) (Supp. 1991). In Illinois, a sentencing jury is to be informed that a life sentence for aggravated, repeat or multiple murder under Ill. Rev. Stat. ch. 38, para. 1005-8-1 (Smith-Hurd Supp. 1991), is for the remainder of the defendant's life, and that no such defendant "can be paroled or released, except through executive clemency." People v. Gacho, 122 Ill.2d 221, 522 N.E.2d 1146, 1166 (1988). The Mississippi Supreme Court has held that where a capital defendant is ineligible for parole by reason of his status as a habitual offender under Miss. Code Ann. §47-7-2(1)(a) (Supp. 1991), the defendant is constitutionally entitled to have the trial judge inform the sentencing jury of his parole ineligibility. Turner v. State, 573 So.2d 657 (Miss. 1990), cert. denied, 111 S.Ct. 1695 (1991); Mackbee v. State, 575 So.2d 16, 38-41 (Miss. 1990); accord, Berry v. State, 575 So.2d 1, 13-14 (Miss. 1990), cert. denied, 111 S.Ct. 2042 (1991).

possibility of parole only under very rare circumstances, and neither state has as yet addressed whether defendants facing such sentences are entitled to have the jury apprised of their parole ineligibility.[23] Two of the remaining life-without-parole jurisdictions--South Dakota and Wyoming--do not appear to have considered the question of whether jurors should be instructed concerning the unavailability of parole under those states' current bifurcated capital sentencing procedures.[24]

This leaves only two jurisdictions other than South Carolina, Pennsylvania and Virginia, that impose life without possibility of parole on some or all convicted murderers but refuse to require that judges inform capital sentencing juries of that fact. 18 Pa. Cons. Stat. Ann. 3301(b) (Purdon 1983) (parole board may not release life prisoners); Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929, 941 (1990), cert. denied, 111 S.Ct. 1338 (1991); Commonwealth v. Strong, 522 Pa. 445, 563 A.2d 479, 485-486 (1989), cert. denied, 110 S.Ct. 1536 (1990); Va. Code §18.2-10, -31 (Supp. 1991) (Class 1 felony punishable by death or life imprisonment); Va. Code Ann. §53.1-151(B) (Supp. 1991) (certain recidivists ineligible for parole); O'Dell v. Commonwealth, 364 S.E.2d 491,

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[23]A newly-enacted Florida statute provides for life without possibility of parole as an alternative to the death penalty in a narrow category of capital drug offenses. Fla. Stat. 893.135, 921.142(4)(b) (Harrison 1991). Utah has similar limitations on parole only for certain sex-related crimes. Utah Code Ann. 76-3-408 (1990).

[24]See S.D. Codified Laws Ann. §24-15-4 (1988); Wyo. Stat. §§6-2-101(b), 7-13-402(a) (Supp. 1991).

507, cert. denied, 488 U.S. 871 (1988); see also O'Dell v. Thompson, 112 S.Ct. 618 (1991) (Blackmun, J., respecting denial of certiorari).[25] Neither the Pennsylvania nor Virginia courts appear to have explained in any detail the reasons for their unusual position. Therefore, it is not possible to discern whether any peculiarity of Pennsylvania or Virginia law may justify the refusal of those states to inform capital sentencing juries of capital defendants' permanent ineligibility for parole.[26]

In sum, petitioner's request that the jury be told that a life sentence means life without parole would have been granted in all but a handful of jurisdictions. Indeed, in sixteen life-without-parole states petitioner's request would have been unnecessary,

[25]For a detailed discussion of the constitutionality of Virginia's treatment of this issue prior to O'Dell, see William W. Hood, III, The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing, n.17 supra.

[26]One factor that might help to explain the position taken by the Pennsylvania and Virginia courts is that, in contrast to South Carolina, both states provide for gubernatorial commutation of prison sentences. Pa. Const. art. 4, §9(a) ("In all criminal cases except impeachment, the Governor shall have power . . . to grant . . . commutation of sentences" subject to recommendation of Board of Pardons); Va. Const. art. V, § 12 ("The Governor shall have power to remit fines and penalties . . . [and] to grant reprieves and pardons after conviction . . . "). Because a sentencing verdict of "life imprisonment without possibility of parole" might be deemed misleading where state law provides for the possibility of gubernatorial commutation, see California v. Ramos, 463 U.S. at 1009, an argument can fairly be made for excluding all mention of post-conviction release in jurisdictions where such commutation is possible. But as noted previously, South Carolina is one of only two death penalty states in which sentences of life-without-parole may not be modified by gubernatorial commutation. Ala. Const. Amend. XXXVIII § 124 (governor may commute only death sentences); S.C. Const. art. IV, § 14 (same); see Wright, supra n. 9, at 550 n. 141.

because the trial judge would have submitted verdict forms to the jury making clear that the life sentence alternative was without possibility of parole, or else would have instructed the jury to that effect at the outset of their deliberations.

Although such an overwhelming weight of authority does not, in and of itself, condemn as unconstitutional the practices of the two minority jurisdictions, the readiness of all but a few states to enlighten the jury on the point surely suggests the importance of the information at issue. The Court's observation regarding the general rule governing submission of lesser included offenses in Beck v. Alabama, could be said of parole ineligibility as well: "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard." 447 U.S. at 636-637.

D. THE ISSUE PRESENTED BY THIS CASE REQUIRES RESOLUTION BY THE COURT

In his opinion respecting the Court's denial of certiorari in O'Dell v. Thompson, 112 S.Ct. 618 (1991), Justice Blackmun characterized as a "substantial federal claim" a Virginia death-sentenced prisoner's argument that his right to rebut the prosecution's case for death had been violated by the trial judge's refusal to inform the jury that the only available alterative to a death sentence was life imprisonment without parole. Id. at 619 n. 3. Even more recently, Justice Souter noted the broader question of "the propriety of a sentence based on future dangerousness to

the public when there is no possibility that a defendant will be sentenced to a term less than life without the possibility of parole." Graham v. Collins, 113 S.Ct. 892, 925 n. 10 (1993) (Souter, J., dissenting).

The questions noted in these opinions are familiar to any trial-level observer of the administration of American capital punishment statutes. See, e.g., J. Mark Lane, "Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence, 26 Loy. L.A. L. Rev. 327, 368-90 (1993) (setting out transcript excerpts showing that between 1973 and 1990, jury inquired about parole eligibility in 25 percent (70 out of 280) of Georgia cases where death penalty was imposed). Because the widespread trend toward restricting or abolishing parole for violent offenders has not been accompanied by public awareness of the increasing severity of noncapital punishments, see supra at n. 11, the Court may expect to encounter other cases in which death sentences were imposed by juries unaware of the existence of a life-with-parole alternative.

South Carolina may well have been justified in removing all hope of parole from repeat violent offenders. But once the state made the judgment that such perpetual imprisonment was necessary to protect society from offenders like the petitioner in this case--that society could never again allow him to be, as the prosecutor put it, "in our midst"--there was no justification for concealing that fact from the jury charged with determining whether petitioner

should be executed or allowed to live. The Court should grant certiorari to consider the important constitutional questions raised by this case, and should require that petitioner be resentenced by a jury informed of its actual sentencing alternatives. Only then will it be possible to say that petitioner's sentence, whatever it may ultimately be, is "based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. at 357.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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By: David J. Bruck
ATTORNEYS FOR PETITIONER

June 8, 1993

* Counsel of Record

The STATE, Respondent,

v.

Jonathan Dale SIMMONS, Appellant.

No. 23784.

Supreme Court of South Carolina.

Heard Oct. 13, 1992.

Decided Feb. 1, 1993.

Rehearing Denied March 10, 1993.

Defendant was convicted by the Rich- and County Circuit Court, Ralph King

Anderson, Jr., J., of murder, first-degree burglary and petty larceny, and defendant appealed. The Supreme Court, Moore, J., held that: (1) evidence of previous crimes was properly admitted, and (2) jury was properly instructed that sentence of life imprisonment meant life without parole.

Affirmed.

Finney, J., filed dissenting opinion.

1. Criminal Law ⇐371(1)

Clear and convincing evidence of other crimes that is logically relevant to prove intent is admissible under *State v. Lyle* if its probative value outweighs its undue prejudicial effect.

2. Criminal Law ⇐338(1)

Evidence is relevant if it tends to make more or less probable some matter in issue upon which it directly or indirectly bears.

3. Criminal Law ⇐371(6)

Evidence that defendant committed violent sexual assaults after forcing his way into elderly victims' homes was properly admitted as evidence tending to establish intent on burglary charge; evidence of defendant's violence against elderly women, each of whom was alone in her home at time of attack, made more probable defendant's criminal intent when he entered current victim's home, since he already knew her to be elderly and theft was not overwhelming motivation in prior cases.

4. Criminal Law ⇐769

Test for sufficiency of jury charges is what reasonable juror would have understood charge to mean.

5. Criminal Law ⇐823(1)

Although trial judge in murder trial erroneously declined to give "plain meaning" charge upon request, error was cured when he properly answered jury's question regarding possibility of parole by giving plain meaning charge, from which reasonable juror would have understood that life imprisonment meant life without parole.

David I. Bruck, and M. Anne Pearce, of S.C. Office of Appellate Defense, Columbia, for appellant.

Atty. Gen. T. Travis Meldock, Chief Deputy Atty. Gen. Donald J. Zelenka, and Sol. Richard A. Harpootlian, Columbia, for respondent.

MOORE, Justice:

Appellant was convicted of murder, first degree burglary, and petit larceny. He was sentenced to death, a consecutive life term, and thirty days. We affirm.

FACTS

On July 17, 1990, the victim, Josie Lamb, was found dead in the bathroom of her home in the Olympia area of Columbia. Her skull had been crushed by an assailant who used the toilet tank lid to beat her on the head. Ms. Lamb was seventy-nine years old.

Appellant's fingerprint was found on the commode lid and his bloody footprint on the floor. He was arrested the next day and confessed to killing Ms. Lamb. He stated he went to her house "to see a white male named Jimmy, redheaded, he owed me 50 dollars." He had been to Ms. Lamb's house and asked for Jimmy the previous week but when he touched the door handle Ms. Lamb screamed and he fled. On the night of the murder, he entered the home and heard her scream. After looking around to be sure no one else was present, appellant went into the bathroom and struck Ms. Lamb twice on the head with the commode lid. At some point he unplugged the telephone. He took a nightgown from a bedroom and fled.

At the guilt phase of trial, counsel conceded that appellant had in fact murdered Ms. Lamb and had taken the nightgown. Appellant's defense focused on the State's failure to prove first degree burglary which was the only statutory aggravating circumstance alleged in this case. He contended there was no evidence he intended to commit a crime at the time he entered Ms. Lamb's house since, as stated in his confession, he had gone there intending only to look for "Jimmy."

In response to appellant's trial strategy, the State was allowed to introduce under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), evidence of appellant's confessions to other crimes against three elderly female victims.

ISSUES

1. Whether the *Lyle* evidence was properly admitted?
2. Whether appellant was entitled to a penalty phase charge regarding his parole ineligibility?
3. Whether a charge regarding general deterrence should have been given?
4. Whether a charge describing each asserted nonstatutory mitigating circumstance should have been given?

DISCUSSION

GUILT PHASE

S.C.Code Ann. § 16-11-311(A) (Supp. 1991) requires the State to prove as one element of first degree burglary that the defendant "entered a dwelling without consent and with intent to commit a crime therein." While such an intent is inferable from the defendant's conduct in the absence of other proof, *State v. Haney*, 257 S.C. 89, 184 S.E.2d 344 (1971), here the issue of intent was joined by evidence appellant had no intent to commit a crime when he entered Ms. Lamb's house. To prove intent, the Solicitor introduced the following three confessions given by appellant shortly after his arrest for Ms. Lamb's murder:

1. *Faris v. Mims*

   Ms. Mims is an elderly woman who lived in the Olympia area of Columbia at the time she was assaulted. In May 1990, appellant approached the front door of Ms. Mims house and asked for directions. He then went to her back door and forced his way in. He sexually assaulted her while choking her with some clothing around her neck. He stole $50 from the house. He admitted he chose the victim because he saw she was an "old lady."

2. *Marie Furtick*

   Ms. Furtick was seventy-one years old at the time she was assaulted by appellant in her home in the South Congaree area. In August 1989, appellant went to Ms. Furtick's front door and threw water on her when she opened the door. He then raped her, beat her, and stole money.

3. *Estelle Simmons*

   Ms. Simmons is appellant's grandmother. She was seventy-one years old and lived near Ms. Furtick when, in June 1990, appellant raped and beat her in her home. He unplugged her telephone and looked for money.

The State introduced other evidence that both Ms. Furtick and Ms. Simmons were very severely beaten about the head and face. Ms. Furtick was bitten on the breast and buttocks. Although appellant's confessions indicate he took money from both Ms. Furtick and Ms. Simmons, the State's evidence indicates nothing of value was taken from either home.

Appellant argues that this evidence of other crimes should have been excluded because (1) these crimes were too dissimilar to the Lamb murder to be probative and (2) the prejudicial impact of this evidence was too great.

[1] We find this evidence was properly admitted under *State v. Lyle* as evidence tending to establish intent. Clear and convincing evidence of other crimes that is logically relevant to prove intent is admissible under *State v. Lyle* if its probative value outweighs its undue prejudicial effect. *See State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990). Although appellant asserts these other crimes are "too dissimilar" to be admitted under *State v. Lyle*, we find the evidence of other crimes is logically relevant to the issue of intent.

[2, 3] Evidence is relevant if it tends to make more or less probable some matter in issue upon which it directly or indirectly bears. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991); *State v. Bell*, *supra*. The evidence of appellant's violence against elderly women, each of whom was alone in her home at the time of the attack, makes

more probable appellant's criminal intent when he entered Ms. Lamb's house since he already knew her to be an elderly woman. Although there was no sexual assault in Ms. Lamb's case, all of the previous sexual assaults were accompanied by terrific physical violence far beyond that needed to accomplish the sexual assault itself. Moreover, theft was not the overwhelming motivation in these prior cases. It is logical to conclude from the evidence that appellant was chiefly motivated in each case by an intent to violently injure an elderly woman. This evidence is therefore relevant to the issue of appellant's intent at the time he entered Ms. Lamb's home without her consent.

Further, we find the probative value of this evidence outweighs its undue prejudicial effect. The issue of intent was a contested one. *Cf. State v. Garner*, 304 S.C. 220, 403 S.E.2d 631 (1991) (prejudicial effect of evidence of other crimes outweighs its probative value when purpose for which it is admitted is not a contested issue). The fact that appellant's grandmother was one of several elderly women he violently injured is probative because it demonstrates that even her status as his grandmother did not negate his particular violent intent regarding elderly women.

We hold the evidence of other crimes was properly admitted under *State v. Lyle* as evidence tending to establish intent on the burglary charge in this case.

SENTENCING PHASE

At the sentencing phase of trial, appellant requested a charge that if sentenced to life imprisonment, he would be ineligible for parole under S.C.Code Ann. § 24-21-640 (Supp.1991).[1]

The trial judge ruled that *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), precluded any charge on parole eligibility or ineligibility. After the general sentencing charge was given, the jury posed a question to the judge: "Does the imposition of a life sentence carry with it the possibility of parole?" The trial judge then gave the "plain meaning" charge required under *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985), that the jury was not to consider "parole or parole eligibility" and the terms "life" and "death" are to be understood in their plain and ordinary meaning.

Appellant contends the trial judge erred in refusing his requested charge because *Torrence* did not settle this issue and failure to give the charge violates his due process and eighth amendment rights.

In *Torrence*, the defendant requested a charge that he would be ineligible for parole under § 24-21-640 since he was already serving a life sentence for a previous murder. The trial judge denied the request but offered to charge that under S.C.Code Ann. § 16-3-20 (Supp.1991) the defendant would be eligible for parole only after twenty or thirty years depending upon whether an aggravating circumstance was found. This is the charge approved in *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302 (1987).

Justice Finney, writing for the majority, reversed Torrence's death sentence because "the trial judge committed prejudicial error in denying [his] request to charge based upon § 24-21-640." 305 S.C. at 54, 406 S.E.2d 315. Justice Chandler concurred in result noting that the *Atkins* charge given under § 16-3-20 was inaccurate in Torrence's case. He then overruled *Atkins* for a majority of the Court because (1) parole is not a proper consideration for a sentencing jury since it is not a mitigating circumstance and (2) practical problems may arise in the application of the parole statutes. Further, Justice Chandler's analysis relies on the proposition that the issue is solely a matter of state law under *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

We need not engage in an academic discussion whether *Torrence* applies to both

1. Section 24-21-640 provides:
The Board [of Probation, Parole and Pardon] must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in § 16-1-60.

parole eligibility and ineligibility since we conclude the *Norris* charge given in this case satisfies in substance appellant's request for a charge on parole ineligibility.

In *State v. Davis*, — S.C. —, 411 S.E.2d 220 (1991), we clarified that despite our ruling in *Torrence*, a defendant is still entitled, upon request, to a plain meaning charge under *State v. Atkins, supra*. Although the trial judge erroneously declined to give a plain meaning charge upon request in this case, the error was cured when he properly followed *State v. Norris, supra*, in answering the jury's question regarding the possibility of parole as follows:

> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

[4, 5] The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean. *State v. Bell*, 305 S.C. 11, 406 S.E.2d 165 (1991); *State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699 (1989). We conclude a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole. We therefore find appellant's argument without merit.

Appellant further contends the trial judge erroneously denied his requested charge that the jury should disregard any alleged deterrent effect on others in deciding whether to impose life or death. The Solicitor, however, declined to argue general deterrence to the jury and specifically stated "all we are here to do is to deter [appellant]." Thus, general deterrence was never an issue presented to the jury. Moreover, we have previously held the refusal to give such a charge is not error. *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984).

Finally, appellant argues the trial judge erred in denying his request that a detailed list of twenty-seven nonstatutory mitigating circumstances be submitted to the jury. Appellant concedes this procedure is not required so long as the jury is instructed, as it was here, to consider "any nonstatutory mitigating circumstances." *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981).

PROPORTIONALITY REVIEW

We have conducted the sentence review required by S.C.Code Ann. § 16-3-25 (1985) and conclude the evidence supports the jury's finding of an aggravating circumstance. We find the death sentence was not arbitrarily imposed and is proportionate to the penalty in similar cases.

AFFIRMED.

HARWELL, C.J., TOAL, J., and BRUCE LITTLEJOHN, Acting Associate Justice, concur.

FINNEY, J., dissenting in separate opinion.

FINNEY, Justice (dissenting):

I respectfully dissent. In my view, appellant was deprived of a fair trial by virtue of the erroneous admission of appellant's past crimes under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Further, I dissent from the majority's holding that appellant was not entitled to a jury charge to the effect that he would be ineligible for parole if sentenced to life in prison. I would reverse appellant's conviction and remand for a new trial.

Admission of Evidence Under State v. Lyle

At trial, the State introduced appellant's confessions to three past crimes involving the assault of elderly women for the purpose of showing that he entered the victims dwelling with the intent to commit a crime therein. In doing so, the State sought to satisfy the intent requirement of first degree burglary, S.C.Code Ann. § 16-11-311(A) (Supp.1991). In my view, these past crimes do not meet the test of admissibility under *Lyle, supra*, inasmuch as they are factually dissimilar from the present case,

or too remote in time, and in at least one instance, unduly prejudicial.

In order for evidence of other crimes to be admissible under the settled exceptions, the evidence must have "logical relevance to the particular excepted purpose for which it is sought to be introduced". *Lyle*, 118 S.E. at 807. Due to the very nature of such evidence and "the dangerous tendency and misleading probative force", its admission should be subject to rigid scrutiny by the courts. Should the court not clearly perceive logical relevance between the extraneous crime and the offense charged, the defendant should be given the benefit of the doubt and the evidence rejected. *Id.* See also *State v. Douglas*, 302 S.C. 508, 397 S.E.2d 98 (1990).

One prior incident on which evidence was admitted occurred more than one year prior to the offense for which appellant was on trial. I find this offense too remote in time to reasonably establish that because appellant entered this prior victim's dwelling with intent to commit a crime, he did so in the present case, or that there was a common scheme or plan. *Lyle*, 118 S.E. at 808.

Even if the evidence of past crimes is deemed relevant, it may nonetheless be excluded if the danger of unfair prejudice outweighs its probative value. *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987).

The state was permitted to introduce evidence of appellant's assault of his grandmother. I would hold that the prejudicial effect of this most egregious evidence was substantially outweighed by any probative value which may have been deduced therefrom. *Johnson, supra.*

Jury Charge On Parole Eligibility

Appellant contends the Circuit Court erred in declining to charge the jury that in the event he was sentenced to life in prison, he would be ineligible for parole under S.C.Code Ann. § 24-21-640. I agree.

Consistent with my opinion in *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), I believe that appellant was entitled to a jury charge under § 24-21-640 since he "sought only to have the court declare correct and current law relevant to his case". *Id.* 406 S.E.2d at 320.

WEST KEY NUMBER SYSTEM

The Supreme Court of South Carolina

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P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

March 10, 1993

David I. Bruck, Esquire
P. O. Box 11744
Columbia, S. C. 29211

M. Anne Pearce
Assistant Appellate Defender
South Carolina Office of
Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201

Re: The State v. Jonathan Dale Simmons

Dear Ms. Pearce and Mr. Bruck:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing
denied.

s/David W. Harwell C.J.

s/Jean H. Toal A.J.

s/James E. Moore A.J.

"I would grant.

s/Ernest A. Finney, Jr. A.J.

Associate Justice Chandler,
not participating

March 10, 1993."

The remittitur in this matter is today being forwarded to the Clerk of Court for Richland County.

Very truly yours,

Brenda F. Shealy

DEPUTY CLERK

CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED

TITLE 16. CRIMES AND OFFENSES

CHAPTER 3. OFFENSES AGAINST THE PERSON

ARTICLE 1. HOMICIDE

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years; provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. Provided, further, that under no circumstances may a female who is pregnant with child be executed so long as she is in that condition. When the Governor commutes a sentence of death under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole. No person sentenced under the provisions of this subsection may receive any work-release credits, good-time credits, or any other credit that would reduce the mandatory imprisonment required by this subsection.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel shall be permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances

otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in § 44-53-370(e), 44-53-375(B), 44-53-440, or 44-53-445; or

(h) physical torture.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent, or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding an aggravating circumstance or circumstances beyond a reasonable doubt, shall, in writing, and signed by all members of the jury, designate the aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment as provided in subsection (A). In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found an aggravating circumstance or circumstances beyond a reasonable doubt. If the jury has found an aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided.

(D) Notwithstanding the provisions of § 14-7-1020, in cases involving capital punishment any person called as a juror shall be examined by the attorney for the defense.

(E) In every criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror therein by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

§ 16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in§ 16-3-20, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter

provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of§ 16-3- 20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

§ 16-3-26. Punishment for murder: notice to defense attorney of solicitor's intention to seek death penalty; appointment of attorneys for indigent; investigative, expert or other services.

(A) Whenever the solicitor seeks the death penalty he shall notify the defense attorney of his intention to seek such penalty at least thirty days prior to the trial of the case. At the request of the defense attorney, the defense attorney shall be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

(B) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff. Notwithstanding any other provision of law, the court shall order payment of fees and costs, not to exceed five thousand dollars per trial from funds appropriated for the defense of indigents.

§ 16-3-27. Punishment for murder: pregnant females.

In no case and under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition or anytime following thereafter for a period of at least nine months.

§ 16-3-28. Punishment for murder: right of defendant to make last argument.

Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument.

ORIGINAL

Supreme Court, U.S.
FILED
JUL 9 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

No. 92-9059
October Term, 1992

JONATHAN DALE SIMMONS,

Petitioner,

versus

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

T. TRAVIS MEDLOCK
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ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTIONS PRESENTED

I. Does the Eighth Amendment entitle a capital defendant to have the sentencing jury informed, as a reason not to impose the death penalty, that under state law the jury's sentencing alternative of "life imprisonment" means life without the possibility of parole?

II. Did the trial court's refusal to inform the jury that Petitioner could never be paroled if sentenced to life imprisonment violate his due process right to rebut the prosecution's case for death, where the state argued that Petitioner would pose a grave risk of future violence unless he was executed, and where the jury specifically asked about the possibility of parole?

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The Respondent, State of South Carolina, hereby makes a Brief in Opposition to the Petition for Writ of Certiorari and requests that certiorari to review the judgment of the Supreme Court of South Carolina in this case be denied.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported as State v. Simmons, 427 S.E.2d 175 (S.C. 1993), and is reprinted in the Appendix to the Petition at pages A-1 through A-6. The Order of the South Carolina Supreme Court denying rehearing is unreported, and is reprinted at page A-7 in the Appendix to the Petition.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 1, 1993. A timely Petition for Rehearing was denied on March 10, 1993. This Court's jurisdiction is alleged to be invoked pursuant to 28 U.S.C. Section 1257(a). Respondents will assert that there is no federal question presented and the Court is without jurisdiction to review the claim. U.S.S.Ct.R. 10.1(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

2. It also allegedly involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> [N]or shall any state deprive any person of life ... without due process of law ....

3. It also involves S.C. CODE Sections 16-3-10, et seq. (1991 Cum. Supp.), which code sections are reprinted in the Appendix to the Petition at pages A-8 through A-14.

4. It also involves S.C. CODE Section 24-21-640 (1991 Cum. Supp.), which provides in pertinent part:

> The [South Carolina] Board [of Probation, Parole and Pardon] must not grant parole, nor is parole authorized, to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60. Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense.

5. It also involves S.C. CODE Ann. Section 16-1-60 (1991 Cum. Supp.), which provides in pertinent part:

> For purposes of definition under South Carolina law a violent crime includes the offenses of murder, criminal sexual conduct in the first and second degree ... [and] burglary in the first degree ....

STATEMENT OF THE CASE

a. Procedural History.

On July 16, 1990, Josie Lamb was murdered after her home in Richland County was the subject of a burglary and larceny. The Petitioner, Jonathan Dale Simmons, was indicted by the Grand Jury of the Court of General Sessions for Richland County for murder, burglary in the first degree, and petit larceny on October 18, 1990. On January 24, 1991, the Solicitor of the Fifth Judicial Circuit, the Honorable Richard A. Harpootlian, served Notice of Intent to Seek the Death

Penalty and Notice of Evidence in Aggravation pursuant to S.C. CODE ANN. 16-3-26 (1986 Supp.).

The Petitioner proceeded to trial on June 24, 1991, before the Honorable Ralph King Anderson, Jr., Presiding Judge, and a jury. He was represented by Thomas J. Quinn, Jennifer Kneece Shealy, and Thomas W. Bunch, II, through court appointment. The State was represented by Solicitor Richard A. Harpootlian, Deputy Solicitor Warren B. "Barney" Giese, and Assistant Solicitor Jonathan S. Gasser. On June 27, 1991, the jury convicted the Petitioner of murder, burglary in the first degree, and petit larceny.

On June 28, 1991, the sentencing hearing began. During the hearing, Mr. Simmons was also represented by current counsel David I. Bruck, Esquire. After the presentation of evidence in aggravation and evidence in mitigation, the jury, on June 30, 1991, returned a unanimous verdict finding the existence of the statutory aggravating circumstance of murder was committed while in the commission of burglary in the first degree and a sentence of death. The trial judge affirmed the jury recommendation of death for murder. Judge Anderson sentenced the Appellant to death for murder, life imprisonment for burglary in the first degree, and thirty (30) days consecutive for petit larceny.

Defense counsel timely served Notice of Appeal on July 1, 1991, and this appeal followed. On March 12, 1991,

the Appellant filed his Initial Brief of Appellant raising three specific issues.

> I. Was Appellant deprived of a fair trial on the charge of burglary in the first degree by the admission of evidence of prior crimes, the prejudicial effect of which substantially outweighed any probative value?
>
> II. Where the state alleges that the defendant will pose an unreasonable risk of future violent acts unless executed, and where state law precludes all possibility of his release on parole if he is sentenced to life imprisonment, is the defendant constitutionally entitled to have the jury apprised of his ineligibility for parole?
>
> III. Did the sentencing instructions fail to protect against consideration of arbitrary factors in the determination of Appellant's sentence, or to assure constitutionally adequate consideration of nonstatutory mitigating factors?

A Final Brief of Appellant was filed August 18, 1992. The Appellant was represented by Mr. Bruck and M. Anne Pearce of the South Carolina Office of Appellate Defense. The Respondent was represented by current counsel, Donald J. Zelenka of the Attorney General's Office. Oral argument was heard on October 13, 1992. On February 1, 1993, the Supreme Court of South Carolina entered its opinion affirming the judgment of conviction and sentence of death. State v. Simmons, 427 S.E.2d 175 (S.C. 1993). A timely Petition for Rehearing was denied on March 10, 1993.

b. Pertinent facts of the case.

1. How the issue of parole ineligibility was presented.

At the outset of the sentencing proceeding, current counsel Bruck and trial counsel Quinn appeared to argue the inapplicability of the prior state court holding in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), to the present situation and to argue for a sentencing phase instruction specifically on parole ineligibility. (R.A. pp. 1572-1616). In support of parole ineligibility, Indictments 91-GS-32-134 and 135 from Lexington County were presented. Court Exhibits 9, 10. (R.A. pp. 2313-2322). The indictments revealed two separate guilty pleas to criminal sexual conduct in the first degree and sentences imposed on June 19, 1991. [It is without dispute that these are defined violent crimes pursuant to S.C. CODE ANN. Section 16-1-60. (Cum. Supp. 1991).] General Counsel to the South Carolina Department of Corrections, Larry Batson, testified that if the crime of murder were not the same series of events involved in the guilty pleas, Simmons would not be eligible for parole. (R.A. p. 1576). Mr. Batson further acknowledged there were people serving life sentences on work release or who go back into the community. (R.A. pp. 1577-1579). Mr. Batson further acknowledged that there were no statutory prohibitions for an inmate serving life without parole from being either furloughed, put on work release, and that he could not state that he will always remain behind bars. (R.A. pp. 1579-1581). The state agreed to a stipulation that counsel for the current Parole Board would testify that "they will not consider for parole anyone serving

a sentence of life without parole." (R.A. p. 1583). The Petitioner further submitted a survey concerning general public attitudes about the time a convicted murderer serves prior to release. (Court Exhibit 18, R.A. pp. 2323-2331). (R.A. pp. 1583-1584).

After hearing argument, the trial judge entered his Order denying the Appellant's request to charge. (R.A. pp. 1601-1607). Judge Anderson summarized the Torrence decision and concluded:

> I conclude that Torrence should be applied in this case. Therefore, it is ordered that counsel in the matter sub judice shall not engage in any discussion or reference to parole or parole eligibility or parole ineligibility.
>
> Further, this court will not instruct the jury in the initial charge. In the event that the jury inquiries about the matter, the court will use the procedure articulated in State v. John Foster Norris, 328 S.E.2d 3339. The instruction at that time will be as follows: 'You are instructed not to consider parole or parole eligibility. That is not a proper issue for your consideration.
>
> 'The terms "life imprisonment" and "death sentence" are to be understood in their plain and ordinary meaning.'

(R.A. p. 1607, ll. 3-19).

After the Petitioner's initial request had been denied, immediately prior to the jury instructions, the Appellant submitted Defendant's Request to Charge G which stated:

> I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to

> death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that the defendant be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.
>
> In your deliberations, you are not to speculate that these sentences mean anything different form what I have just told you, for what I have told you is exactly what will happen to the defendant, depending on what your sentencing decision is.

(R.A. p. 2339). The trial judge denied the charge stating:

> You lawyers are not to discuss parole or the meaning of those words. We just use them in their ordinary sense in your presentation. If there is a jury query in that regard, I'm ready to respond under my prior ruling.

(R.A. p. 2038, ll. 2-8). The jury subsequently began deliberating and sent out the following "billet-doux" from the jury:

> Judge Anderson, June 30, 1991
> Does the imposition of a life sentence carry with it the possibility of parole?
> s/James S. Wright
> Jury Foreperson

Court's Exhibit 19. (R.A. p. 2344). The jury returned to the courtroom where, over Appellant's objection, the trial judge gave this instruction:

> Thank you, Mr. Bailiff. Mr. Foreman, I received the note and I respond as follows: Mr. Foreman and members of the jury, please, please, give me your attention. You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

(R.A. p. 2106, ll. 1-11). Twenty-five minutes after having its question about parole answered in this fashion, the jury returned to the courtroom with a sentence of death. (R.A. p. 2108, l. 9 - p. 2109, l. 2).

2. How the Supreme Court of South Carolina decided the issue presented to this Court.

In the majority opinion, the Supreme Court of South Carolina concluded that the jury instruction given in this case "satisfies in substance appellant's request for a charge on parole ineligibility." State v. Simmons, 427 S.E.2d at 179. It initially analyzed the prior decision of State v. Torrence, concluding first that (1) parole is not a proper consideration for a sentencing jury since it is not a mitigating circumstance; and (2) practical problems may arise in the application of the parole statutes. Further, Justice Chandler's Torrence analysis relied upon the proposition of this Court in California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), that the issue of charging on parole eligibility was solely a matter of state law. Id. at 178.

The State Supreme Court concluded the issue in the following analysis:

> In State v. Davis, ___ S.C. ___, 411 S.E.2d 220 (1991), we clarified that despite our ruling in Torrence, a defendant is still entitled, upon request, to a plain meaning charge under State v. Atkins,,,,, supra. Although the trial judge erroneously declined to give a plain meaning charge upon request in this case, the error was cured when he

properly followed State v. Norris, supra, in answering the jury's question regarding the possibility of parole as follows:

> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. that is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

> The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991); State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989). We conclude a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole. We therefore find appellant's argument without merit.

State v. Simmons, 427 S.E.2d at 179. Justice Finney dissented. 427 S.E.2d at 180.

WHY THE WRIT SHOULD BE DENIED

1. Petitioner's claim that the jury should have been more fully instructed concerning his ineligibility for parole does not present a federal question.

Simmons asserts that the trial court erred in refusing to instruct in the sentencing phase of his capital trial that he would be ineligible for parole consideration as a "second or subsequent violent offender," pursuant to S.C. CODE Ann. Section 24-21-640. This Court determined in California v. Ramos, 463 U.S. 992, 1001, 1013-1014 (1983), that whether to permit juror consideration of the possibility of commutation and parole is a matter of state law, not

implicating the Federal Constitution. Relying upon a prior decision in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the trial judge in this case concluded that a charge on parole eligibility or ineligibility was precluded as a matter of state law. Subsequently, he instructed the "plain meaning" charge required as a matter of state law under State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985), that the jury was not to consider "parole or parole eligibility" and the terms "life" and "death" are to be understood in their plain and ordinary meaning. (R.A. p. 1607, ll. 3-19, p. 2106, ll. 1-11). The Supreme Court of South Carolina when presented the issue concluded that the trial judge's "plain meaning" instruction, given in response to the jury's inquiry "satisfies in substance appellant's request for a charge on parole ineligibility." State v. Simmons, 427 S.E.2d at 179. It concluded that, under these facts, "a reasonable juror would have understood from the charge that life imprisonment indeed meant life without parole." Id.

This Court's decision in California v. Ramos, supra, which compels the denial of certiorari, stated:

> Our conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their states should not be permitted to consider the Governor's power to commute a sentence. It is elementary that states are free to provide greater protections in their criminal justice system than the Federal Constitution requires. We sit as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is best left to the states. We hold only that the

Eighth and Fourteenth Amendments do not prohibit such an instruction.

Ramos, 463 U.S. at 1013-1014. Since this issue and the treatment of instructions on parole eligibility [a form of commutation by the executive branch] rests solely with the states under Ramos, we submit that certiorari must be dismissed for lack of a federal question. U.S.Ct.R. 10.1(b).

2. Certiorari is not warranted where similar issues have been denied certiorari by this Court.

This Court has consistently denied petitions for certiorari by Virginia prisoners which presented similar issues on refusal to instruct on parole ineligibility in a capital sentencing proceeding. See, e.g., Jenkins v. Virginia, No. 92-7669, ___ U.S. ____, cert. denied (April 19, 1993); Peterson v. Murray, 904 F.2d 882 (4th Cir. 1992); Eaton v. Commonwealth, 240 Va. 236, 397 S.E.2d 385 (1990), cert. denied, 112 S.Ct. 88 (1991); O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491, cert. denied 481 U.S. 871 (1988). This Court's prior denials of certiorari "are ample evidence" that the matter is not an issue worthy of certiorari. See Maggio v. Williams, 464 U.S. 46, 51-52 (1983). See also O'Bryan v. Estelle, 714 F.2d 365, 388-89 (5th Cir. 1983), cert. denied, 465 U.S. 1013 (1984); Andrate v. McCotter, 805 F.2d 1190, 1192-93 (5th Cir. 1986); King v. Lynaugh, 850 F.2d 1055 (5th Cir. 1988), cert. denied, 488 U.S. 1019 (1988); State v. McNeil, 324 N.C. 33, 375 S.E.2d 909, 915-916 (1989); Potts v.

State, 259 Ga. 96, 376 S.E.2d 851, 856-57 (1989); State v. Coleman, 544 N.E.2d 330, 342-43 (Ill. 1989).

3. The state court conclusion that the "plain meaning" instruction satisfied the request was an appropriate determination.

Respondent asserts that the issue of whether the jury need be advised of parole ineligibility is not properly before this Court because the state court properly concluded that the "plain meaning" instruction under a "reasonable juror" determination "satisfies in substance appellant's request for a charge on parole ineligibility." Simmons, 427 S.E.2d at 179. As stated previously, we assert that the issue of whether or not a parole ineligibility charge should be given in a capital case is solely a matter of state law and does not present a federal question under Ramos, supra. The state court, without addressing the issue presented to this Court concluded "a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole." Id.

Certiorari is not warranted because the State Supreme Court did not conclude whether or not a parole ineligibility charge should be given in a capital case. The state court, in fact, concluded that a parole ineligibility charge was in fact given. Second, it concluded that the state law requirement for a "plain meaning" instruction had been complied with in response to the jurors questions. Id.

Here, the jury was given in the "plain meaning" instructions accurate and correct information as a matter of state law. First, they were told not to consider parole or parole eligibility in making their decision. It is reasonably likely that a juror would have understood the instruction to mean what it said and followed that instruction. Boyde v. California, 110 S.Ct. 1190 (1990). Cf. Francis v. Franklin, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 1996 n. 9 (1985). ("The Court presumes that jurors, conscious of the gravity of their tasks, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.") Further, it is reasonably likely that the jurors, after being told not to consider parole or parole eligibility to have concluded that the terms "life imprisonment and death sentence are to be understood in their ordinary and plain meaning" would have meant for "life" to be the duration of his life, not as the Petitioner now would suggest.

In King v. Lynaugh, 850 F.2d 1055 (5th Cir. 1988) (en banc), the Fifth Circuit considered related issues presented concerning alleged juror misperceptions about parole law in a capital case. The potential influence of a juror's misperceptions about parole eligibility may be mitigated by other facets of the trial process, such as the breath of voir dire and the jury charge. Here, parole eligibility was not injected into the voir dire process. Repeatedly, the court

and defense counsel here offered only two sentencing options: life imprisonment or death. Here, as in King, if the jurors paid attention during voir dire and followed the trial court's charge and supplemental charge, as this Court must presume they did, any pre-existing misconceptions about parole law would have been ignored. Accord King, supra, at 1060.

In his argument, he relies upon a public opinion survey which he contends would show citizen misconceptions about parole. This survey has little weight because the Court must presume the juror listened to and followed the law as given, Francis v. Franklin, supra, and not have jury instructions determined on the basis of such surveys. Furthermore, the problem with his claim that "all possibility of his eventual release on parole is foreclosed by law" does not accurately take into account (1) other forms of "release" that the survey did not account for and (2) different legal interpretations or statutory amendments which may occur in the future. See California v. Ramos, 463 U.S. 992 (1983). If the Petitioner wants "accurate" information about whether the Petitioner could ever be released form close confinement -- then shouldn't the jury also be advised that he may be placed on work release, trustyship, or furlough at some time in the future and further, that he could be pardoned at any time under extraordinary circumstances. [Testimony of Batson, R.A. pp. 1576-1581]. In Ramos, the Supreme Court recognized that such instructions, including the parole instruction, are not

constitutionally required, and left those decisions to the state legislatures and courts on whether such instructions would occur. In Torrence the state court reasonably decided that it would not inject such information into jury deliberations. This case does not provide a need to do so now and reopen what has been a state law matter since Ramos.

In his argument, Simmons devotes a great deal to his analysis of what twenty-two states with life without parole have done with respect to jury instructions. While not disagreeing with his analysis of the other state laws which have life without parole, we do disagree with his groups. First, the jury in four states, Maryland, Nevada, Oklahoma, and Oregon, have a choice between life without parole (LWOP) and life with parole. Those states are clearly not similar to the South Carolina situation. It would appear then that only three (3) states, Colorado, Illinois, and Mississippi, require that the jury be informed of the "no parole" status. Importantly, Illinois in People v. Coleman, 544 N.E.2d 330 (Ill. 1989), recognized that the issue was purely a state law matter and concluded there was no constitutional violation in the failure to give such an instruction. In the nine (9) states the Petitioner cites in note 21, it would appear that the terms of verdict explain the sentence as being without parole. Nevertheless, Respondent submits that this is far from overwhelming as two states, Virginia and Pennsylvania, specifically do not allow such instructions and four others

have not yet addressed the issue. Further, instructions concerning eligibility for parole have been rejected in Georgia, Potts v. State, 376 S.E.2d 851, 856-57 (Ga. 1989), and North Carolina, State v. McNeil, supra. Under California v. Ramos, the court left it to the state legislatures to determine when the instructions about release programs be given, but does not create a federal constitutional violation.

Further, Simmons now contends that his history of brutal attacks upon elderly women created an enhanced need for the no-parole instruction because of his alleged showing that he only posed a danger to elderly women who he would not have contact with if he remained in the prison setting. The Appellant recognizes, however, that there was no mention from any witness presented to the jury, argument by either counsel, or the instructions of the possibility of parole. The problem with his speculation in the area is that it ignores the testimony of Mr. Batson and the current status of correctional law that he could be eligible by statute for furloughs, work release trusty, or pardon pursuant to Section 24-21-950, and that, in fact, inmates do infrequently escape from confinement into the general public and may commit brutal crimes. See State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985); State v. Middleton, 295 S.C. 318, 368 S.E.2d 457 (1988) (escapee from Corrections work crew); Kornahrens v. Aiken, 87-CP-10-3010, Charleston County certiorari appeal (death row inmate escapes during PCR hearing). The Petitioner's problem,

therefore, is that the trial judge's instruction of "plain meaning" was actually more factually accurate than the Petitioner's requested instruction which would have suggested that he would always remain inside a prison. (Petition, p. 10).

Respondent would further assert that parole ineligibility is not a mitigating factor under Skipper v. South Carolina, 476 U.S. 1 (1986). The state court rejected similar arguments in State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989); and State v. William Bell, 406 S.E.2d 165, 171 (S.C. 1991). While we may agree that an individual's future adaptability to prison may be more speculative than parole ineligibility, it does not create a relevant mitigating circumstance under Skipper, supra.

In Peterson v. Murray, 904 F.2d 882 (4th Cir. 1990), the court concluded that an instruction that did not tell a jury of a defendant's ineligibility for parole (for twenty years) did not prevent the jury from considering relevant mitigating evidence under Lockett v. Ohio, 438 U.S. 586, 604-605 (1978). Accord Turner v. Bass, 753 F.2d 342, 354 (4th Cir. 1985). Respondents submit that the fact of a prior history of violent crime placing a defendant in a status of not being able to be considered for parole as opposed to being parole eligible is not a "mitigating" fact and does not violate the mandates of Skipper v. South Carolina, 476 U.S. 1 (1986). Lockett stands for the proposition that "the Eighth

and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Accord Johnson v. Texas, No. 92-5653 ___ U.S. ___ (June 24, 1993). Here, the Petitioner seeks to use the sentence itself as "mitigating evidence" under Lockett. Parole eligibility or ineligibility is not "relevant mitigating evidence." His assertion to the contrary must be denied as a reason for certiorari.

CONCLUSION

For all the foregoing reasons, certiorari must be denied.

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By: 

July 9, 1993

Columbia, South Carolina

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. 92-9059

JONATHAN DALE SIMMONS,

Petitioner,

v.

SOUTH CAROLINA,

Respondent

On Petition for Writ of Certiorari
To the Supreme Court of South Carolina

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

1. The significance of denials of certiorari in other cases.

Ignoring the settled principle that "a denial of a petition for certiorari has no significance as a ruling," Parker v. Ellis, 362 U.S. 574, 576 (1959), and "does not imply approval of the decision for which review is sought. . . ." Elgin, Joliet and Eastern Ry. Co. v. Gibson, 355 U.S. 897 (1957) (memorandum of Frankfurter, J.)., respondent argues that this petition should be denied because the Court has declined to take up similar claims in the past. Brief in Opposition at 11-12. Even if it were accurate, respondent's claim that the issue presented in this case has been rejected for consideration in prior cases would mean little. Compare, e.g., Cage v. Louisiana, 498 U.S. 39 (1991) (denying certiorari to review state court's conclusion that unconstitutional instruction on reasonable doubt could be disregarded as harmless), with Sullivan v. Louisiana, 113 S.Ct. 373 (1992) (granting certiorari to consider identical question), and id., 113 S.Ct. 2078 (1993) (unanimously reversing state court's judgment on harmless error question). In any event, most of the cases which respondent cites as having presented the claim advanced in this case are distinguishable, since they either involved claims that defendants were constitutionally entitled to question prospective jurors about their views on parole during voir dire examination, see e.g., King v. Lynaugh, 850 F.2d 1055 (5th Cir.), cert. denied, 488 U.S. 1019 (1988), State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), or

else did not involve statutory provisions for life imprisonment without parole, Peterson v. Murray, 904 F.2d 882 (4th Cir. 1992) (20-year parole eligibility), Jenkins v. Commonwealth, 244 Va. 445, 433 S.E.2d 360, 369 (1992), cert. denied, 113 S.Ct. 1862 (1993) (30-year parole eligibility), or both. King, supra; McNeil, supra.

2. Recent statutory changes have increased the already overwhelming support of state courts and legislatures for the result urged by petitioner.

Respondent appears to acknowledge the accuracy of petitioner's survey of the practices of other death penalty jurisdictions with life-without-parole alternatives, but offers a vague objection to his characterization of what the survey shows. Brief in Opposition at 15-16. Specifically, respondent seeks to exclude from petitioner's list of "truth-in-sentencing" jurisdictions four states (Maryland, Nevada, Oklahoma and Oregon) which offer the jury a choice between parole-eligible and parole-ineligible life sentences. Although respondent insists that these jurisdictions "are clearly not similar to the South Carolina situation," id., they are similar in the only respect relevant to this case. Like the nine states in which the jury's sentencing verdict forms themselves inform the jury of the defendant's parole ineligibility, see Pet. for Cert. at 37 n. 21, and like the three additional states which mandate specific jury instructions on the unavailability of parole, id., at 38 n. 22, these four states ensure that each capital sentencing jury is accurately apprised,

when it makes its life-or-death decision, of whether the particular defendant before it will be ineligible for parole if sentenced to life imprisonment.

Moreover, during their 1993 legislative sessions, three more states--Georgia, Indiana, and Tennessee--have joined Maryland, Nevada, Oklahoma and Oregon in permitting capital juries to select life without possibility of parole as one of several sentencing alternatives to the death penalty. As revised by 1993 Georgia Act 569, Ga. Code § 17-10-31.1(a) now provides that the jury must select between binding sentencing alternatives of death, life imprisonment without parole, and parole-eligible life imprisonment.[1] Likewise, Indiana capital sentencing juries are now required to recommend to the court whether "the death penalty or life imprisonment without parole, or neither, should be imposed." 1993 Ind. Act 250, 1993 Ind. Legis. Serv. 250 (West). Finally,

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[1]This statutory change effectively overrules Potts v. State, 296 Ga. 376 S.E.2d 851 (1989), which respondent has cited in its brief. The Georgia legislature's action also ensures that future Georgia juries will not be subject, as have so many in the past, to the capricious effects of misinformation and speculation concerning the practical effect of a sentencing verdict other than death. See J. Mark Lane, "Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence, 26 Loy. L.A. L. Rev. 327, 368-90 (1993) (documenting 70 instances of jury inquiries about parole eligibility in post-Furman Georgia trials which ended in death sentences); id., 391-393 (excerpts from 10 post-trial juror interviews in one Georgia capital case demonstrating actual impact of juror speculation about parole eligibility); Anthony Paduano & Clive Stafford Smith, Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Columbia Human Rights L. Rev. 211 (1987) (detailing history and documenting effects of Georgia's prior rule against allaying jurors' concerns about parole).

this year's amendment to Tennessee's capital sentencing procedures creates two sentencing alternatives to the death penalty--life without possibility of parole, and life without parole for at least 25 years--and requires that the jury choose between these three alternatives after being clearly instructed by the trial judge "that a defendant who receives a sentence of imprisonment for life without possibility of parole shall never be eligible for release on parole." 1993 Tenn. Pub. Acts 473, § 4.

As a result of these statutory changes, the total number of capital punishment jurisdictions which inform sentencing juries of the existence and availability a life-without-parole alternative to the death penalty now stands at 19, while only three states--Pennsylvania, South Carolina and Virginia--refuse to require or allow that juries be told of the no-parole sentencing alternative. Petitioner realizes that even such "near universal" views of state courts and legislatures do not, by themselves, establish the unconstitutionality of contrary positions. Beck v. Alabama, 447 U.S. 625, 636-3 (1980). But the fact that so many capital punishment states which employ life-without-parole alternatives have now acknowledged the practical importance of providing sentencing juries with the fact of the defendant's ineligibility for parole certainly supports petitioner's claim concerning the crucial importance of the information, and the value of the right which he seeks to assert. Id.

3. Respondent has inverted the *Boyde* standard for assessing the constitutionality of the trial court's jury instruction

Respondent also argues, invoking Boyde v. California, 494 U.S. 970 (1990), that "it is reasonably likely" that the jury interpreted the trial judge's supplemental parole instruction--that the jury should not consider parole, and that the term "life imprisonment" was to be understood in its "plain and ordinary meaning"--as signifying that petitioner would never be eligible for parole. This misstates the governing constitutional standard. Boyde requires that a reviewing court determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction" in a way that violates the constitution. 494 U.S. at 380. The Boyde Court expressly stated that under this standard, "a defendant need not establish that the jury was more likely than not to have been impermissibly [influenced] by the instruction." Id. (emphasis added). Thus the mere existence of a reasonable likelihood that the jury's interpretation of the supplemental parole instructions in this case coincided with that of the state supreme court falls far short of establishing that petitioner's constitutional rights were protected. The constitutionally relevant question under Boyde is whether there exists any reasonable likelihood that the jury's misplaced concerns about petitioner's parole eligibility survived the trial judge's needlessly evasive response. The record as a whole and the swiftness with which a death verdict followed the instruction both

establish that such a reasonable likelihood does exist.

Respondent's emphasis on the trial judge's admonition not to consider parole is unavailing. As petitioner has already pointed out, Pet. for Cert. at 16 n. 13, the South Carolina courts have themselves recognized the ineffectiveness of this instruction.[2] While cautionary instructions are normally adequate to safeguard the rights of the accused, "there are there some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton v. United States, 391 U.S. 123, 135 (1968). This is surely such a case. And where the state court could so easily have removed the need for a cautionary instruction simply by telling the jury the truth about petitioner's ineligibility for parole, its refusal to do so is constitutionally intolerable.[3]

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[2]Parenthetically, petitioner would note that a detailed discussion of South Carolina's treatment of parole in capital sentencing proceedings which was cited in pre-publication form in the petition for certiorari has now been published. James M. Hughes, Note: Informing South Carolina Juries About Parole, 44 S.C. L. Rev. 383 (1993).

[3]Petitioner does not suggest that an instruction not to consider parole would be constitutionally suspect in any jurisdiction which actually did authorize parole for convicted capital murderers. See, Johnson v. Texas, No. 92-5653 (June 24, 1993) (noting that jury was instructed "not to consider or discuss the possibility of parole"). Where parole is a real possibility for a murderer who has been spared the death penalty (as it is in Texas, for example), cautionary instructions remain the only way to provide any protection to the defendant without affirmatively misleading the jury. Petitioner's claim is limited to the handful

4. Respondent's attempt to minimize the practical effect of petitioner's ineligibility for parole does not lessen the unfairness of what happened here.

Respondent stresses that the attorney for the South Carolina Department of Corrections could not assure the trial court that petitioner "would always remain behind bars," since South Carolina has no statute (as opposed to regulation) prohibiting furloughs or work-release for life-without-parole inmates. Brief in Opposition at 5. The state also argues that petitioner "could be pardoned at any time under extraordinary circumstances," (although the state's brief contains no suggestion that this has ever occurred in the modern history of South Carolina), id. at 14, and that "inmates do infrequently escape from confinement . . . and commit brutal crimes." Id., at 16. The state does not dispute petitioner's observation that South Carolina is unusually restrictive in its treatment of life-without-parole inmates, inasmuch as it does not authorize gubernatorial commutation of such sentences, and in general the state's argument appears to amount to little more than an assertion of the truism that no one can predict the future with absolute certainty. It is a sufficient answer to arguments of this sort that the constitutional principles of Lockett, Gardner and Beck do not require, as a prerequisite to admission of information militating against imposition of the death penalty, that the

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of jurisdictions which have eliminated parole entirely for some or all life-sentenced capital murderers, but which refuse to inform capital sentencing juries of that fact.

information be absolutely and irrebuttably dispositive of the point in contention. Petitioner does not dispute the right of the prosecution to show that petitioner could still pose a danger to society even if sentenced to life without possibility of parole. California v. Ramos, 463 U.S. 992 (1983). All he sought at trial was a fair chance to inform the jury of the most crucial single fact weighing in his favor on that issue.

The evidence supporting petitioner's view of the practical importance of parole as an issue in capital sentencing continues to grow. One especially striking finding, reported in a recently-published article, shows that the sentencing decisions of capital juries correlates with the jurors' predictions concerning the actual effective length of "life" sentences for murder. William J. Bowers, Capital Punishment & Contemporary Values: People's Misgivings and the Court's Misperceptions, 27 Law & Soc. Rev. 157, 169-70 (1993). Using post-trial juror interview data from California, Florida and South Carolina, Bowers found that

> [i]n each of these three states, believing that convicted first-degree murderers would get out sooner is associated with voting for death. Notably, the relationship between belief in early release and voting for death is more pronounced as fewer jurors in the state appear to know what the mandatory minimum sentence is. Thus the difference is least evident in California, where a third of the jurors appear to know that life without parole is the sentence that will be imposed in lieu of death, and most pronounced in South Carolina where fewer than 15% appear to know the mandatory minimum.

Id. (emphasis added). The significance of Bowers' South Carolina juror interviews is all the greater in this case, since the

"mandatory minimum" to which he referred was 30 years--the term which must be served prior to parole eligibility by convicted capital murderers who, unlike petitioner, have no prior convictions for violent offenses. S.C. Code Ann. § 16-3-20(A) (1992 Supp.). Bowers' data reveals that of 114 actual South Carolina capital jurors interviewed, only a negligible number--3.7 percent--understood a life sentence to mean (as it did in petitioner's case) life without parole. Id., Table 6. This provides powerful corroboration for the findings of petitioner's statewide public opinion survey, admitted into evidence in the trial court, which showed that almost no jury-eligible South Carolinians understood the "plain meaning" of life imprisonment to be life without parole, and that defendants' parole-eligibility (real or imagined) would weigh heavily in most jurors' sentencing decisions.

In Skipper v. South Carolina, 476 U.S. 1 (1986), respondent argued that the likely good behavior of a convicted murderer in a prison setting was "irrelevant" to the jury's sentencing decision, and that evidence bearing on that issue could be excluded from capital sentencing hearings despite the rule of Lockett v. Ohio, 438 U.S. 586 (1978). This Court, of course, held otherwise. Respondent now candidly admits that "[w]hile we may agree that an individual's future adaptability to prison may be more speculative than parole ineligibility," such ineligibility nevertheless "does not create a relevant mitigating circumstance under Skipper." Brief in Opposition at 17. Respondent's concession that the

excluded factor here is "less speculative" than was the excluded factor in Skipper effectively forecloses South Carolina's effort to distinguish Skipper. Like the rule struck down in Skipper, South Carolina's decision to conceal from capital sentencing juries its own judgment that defendants like petitioner are never to be paroled justifies review by this Court.

No. 92-9059

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In The

Supreme Court of the United States

October Term, 1993

JONATHAN DALE SIMMONS,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

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CHRONOLOGY OF RELEVANT EVENTS

October 18, 1990:	Petitioner indicted for murder, burglary in the first degree and petit larceny.
June 24, 1991:	Petitioner's trial begins in Richland County Court of General Sessions.
June 27, 1991:	Petitioner convicted as charged.
June 29, 1991:	Beginning of sentencing proceeding before trial jury.
June 30, 1991:	Jury recommends death sentence; petitioner sentenced to death.
February 1, 1993:	Conviction and sentence of death affirmed by Supreme Court of South Carolina, *State v. Simmons*, 427 S.E.2d 175 (S.C. 1993).
March 10, 1993:	Timely petition for rehearing denied without opinion by Supreme Court of South Carolina.
March 26, 1993:	Stay of execution of sentence of death granted by Supreme Court of South Carolina, pending filing and disposition of petition for writ of certiorari in the Supreme Court of the United States.

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

County of Richland

South Carolina

v.

Jonathan Simmons

[Tr. 217] [THE SOLICITOR:]

THE SECOND THING I WOULD ASK IS THAT YOU EXCLUDE ANY MENTION OF PAROLE DURING VOIR DIRE. OBVIOUSLY, WE ARE GOING TO ASK YOU TO EXCLUDE ANY MENTION OF PAROLE THROUGHOUT THIS TRIAL, BUT SPECIFICALLY SINCE WE'RE GETTING READY TO ADDRESS THE JURY IN A VOIR DIRE PROCESS TO EXCLUDE THAT UNDER THE SUPREME COURT'S NEWEST CASE, STATE VERSUS TORRENCE, A LEXINGTON COUNTY CASE.

[Tr. 218] THE COURT: LET THE RECORD SHOW THAT ANDERSON'S NOTEBOOK REPORTS THE CASE AS THE STATE VERSUS MICHAEL R. TORRENCE, T-O-R-R-E-N-C-E, OPINION NUMBER 23403, FILED MAY 20, 1991. AFFIRMED IN PART; REVERSED IN PART AND REMANDED. JUSTICE FINNEY WRITING FOR THE COURT. WHAT SAY YOU, MR. QUINN?

MR. QUINN: YOUR HONOR, THIS MAY TAKE AWHILE TO TALK ABOUT TORRENCE. THE FIRST POINT I WOULD BRING TO THE COURT'S ATTENTION IS, OF COURSE, IF TORRENCE REALLY STANDS FOR THE PROPOSITION THAT THERE SHOULD BE NO PAROLE ELIGIBILITY DISCUSSED, THEN WHY WAS

THE CASE REMANDED WITH INSTRUCTIONS FOR THE JURY TO BE MADE AWARE THAT MR. TORRENCE, IN FACT, DID NOT FACE PAROLE ELIGIBILITY BECAUSE OF –

THE SOLICITOR: YOUR HONOR, FOR PURPOSES OF THE RECORD, FOR JUST THIS PORTION, WE ARE STIPULATING THAT THE DEFENDANT PLED GUILTY LAST WEEK IN LEXINGTON COUNTY TO TWO CRIMES WHICH UNDER THE OMNIBUS CRIME ACT WOULD MAKE HIM ILLEGIBLE [sic] FOR PAROLE. THAT IS THE RELEVANCE OF TORRENCE TO THIS PROCESS. SO, WE ARE STIPULATING TO THAT ONLY FOR THE PURPOSES OF THIS MOTION. IF IT COMES UP IN ANOTHER CONTEXT, WE WILL BE REQUIRING PROOF FROM THE DEFENDANT OF WHAT I HAVE JUST STIPULATED TO.

MR. QUINN: WELL, I MEAN, I'LL ACCEPT THE STIPULATION. IT'S SORT OF SILLY TO STIPULATE TO IT NOW AND [Tr. 219] SAY IT DOESN'T EXIST LATER, BUT I CERTAINLY ACCEPT THE STIPULATION THAT HE DOES HAVE A PRIOR CONVICTION FOR A PRIOR VIOLENT CRIME –

THE SOLICITOR: AND WE MAY STIPULATE TO IT LATER ON. I JUST DON'T WANT TO BIND MYSELF AT THIS POINT.

MR. QUINN: THEREFORE, UNDER SECTION 24-21-640 OF OUR CODE WITH A PRIOR CONVICTION FOR VIOLENT CRIME, HE WOULD NOT BE ELIGIBLE FOR PAROLE ON A CONVICTION FOR A SECOND VIOLENT CRIME WHICH, OF COURSE, IF HE IS CONVICTED IN THIS CASE OF THE MURDER AND/OR

THE BURGLARY WHICH BOTH ARE VIOLENT CRIMES UNDER OUR CODE.

IN TORRENCE, THEY REMANDED THE CASE FOR THE JURY TO BE INSTRUCTED AS FAR AS 24-21-640. SO, MY POSITION FIRST OF ALL IS THAT IT APPEARS TORRENCE MAY STAND FOR THE PROPOSITION THAT YOU ARE NOT SUPPOSED TO TELL JURORS ABOUT PAROLE ELIGIBILITY. THE TWENTY, THIRTY PROBLEM THAT WE RAN INTO WITH ADKINS, BUT THAT LACK OF ELIGIBILITY, THE ABSOLUTE PROHIBITION OF THE LAW AGAINST ELIGIBILITY MAY, IN FACT, BE CHARGED TO THE JURY.

THE COURT: WELL, COUNSEL, WE ARE TALKING ABOUT TWO DIFFERENT THINGS. WE ARE TALKING ABOUT A LEGAL PRINCIPLE IN REGARD TO A JURY CHARGE AND WE ARE TALKING ABOUT QUERY THAT IS POSITED UNDER VOIR DIRE. QUERY THAT IS POSITED UNDER THE AMBIT AND PENUMBRA OF VOIR DIRE DOES NOT STAND IN THE SAME POSITION AS A JURY CHARGE GIVEN BY THE [Tr. 220] COURT TO THE JURY IN REGARD TO PERTINENT RELATIVE ISSUES.

NOW, TORRENCE DOES NOT DEAL WITH VOIR DIRE QUESTIONS RELATING TO PAROLE ELIGIBILITY. THERE'S NOTHING IN THIS CASE THAT RELATES TO THE JURY VOIR DIRE IS THERE, COUNSEL, OR HAVE I MISSED SOMETHING? MY PEEDEE BIFOCALS MAY HAVE JUMPED BUT I FAIL TO SEE A SINGLE LINE OR SENTENCE IN REGARD TO VOIR DIRE. WE DEAL WITH JURY CHARGE APPLICABILITY. AND IT IS IN THAT SETTING THAT I WOULD DEAL WITH THE

MATTER RATHER THAN ON A VOIR DIRE BASIS, IS IT NOT?

MR. QUINN: YES, SIR, EXCEPT THAT MY POSITION WOULD BE THAT IN VOIR DIRE, WE SHOULD ALSO BE ALLOWED TO ASK THE JURORS CONCERNING THEIR BELIEFS ABOUT CAPITAL PUNISHMENT, CERTAINLY THE QUESTIONS THAT YOUR HONOR ASK THEM ABOUT WHETHER THEY ARE JUROR NUMBER ONE, TWO OR THREE AND THAT THEIR POSITION AS TO WHETHER THEY ARE JUROR ONE, TWO OR THREE COULD BE AFFECTED BY WHAT, IN FACT, LIFE IMPRISONMENT MEANS. DOES IT MEAN, IN FACT, AN ABSOLUTE LIFE WHICH IT WOULD IN THIS CASE IF THERE WAS A CONVICTION OF A VIOLENT CRIME OR DOES IT MEAN SOME FUTURE PAROLE ELIGIBILITY.

AND, SO THAT'S WHY I BELIEVE – ALTHOUGH WE'LL ARGUE, IF YOU PREFER, ABOUT THE JURY CHARGE LATER – AT THIS TIME, I THINK, IT WOULD BE PROPER FOR US TO BE ABLE TO ASK THAT QUESTION IN VOIR DIRE. THAT THEY UNDERSTAND THAT [Tr. 221] LIFE IN THIS CASE MEANS A NATURAL LIFE, NO PAROLE AND NO MAX-OUT.

THE COURT: ALL RIGHT. ANY FURTHER ARGUMENT, COUNSEL?

THE SOLICITOR: NO, SIR, YOUR HONOR.

THE COURT: ORDER. THE MATTER BEFORE THE COURT NOW IS AN ISSUE RELATING TO VOIR DIRE EXAMINATION OF PROSPECTIVE JURORS IN

REGARD TO PAROLE ELIGIBILITY. ERUDITE COUNSEL HAVE CITED TO THE COURT STATE VERSUS TORRENCE, OPINION NUMBER 23403. A PERUSAL OF TORRENCE REVEALS A DISCUSSION OF PAROLE ELIGIBILITY IN THE CONTEXT AND WITHIN THE AMBIT OF JURY INSTRUCTIONS. TORRENCE DOES NOT ARTICULATE A RULE IN REGARD TO VOIR DIRE EXAMINATION OF JURORS ON THE ISSUE. CERTAINLY A HORNBOOK OR BLACK LETTER LAW ANALYSIS OF THIS MATTER REVEALS A SEPARATE AND DISTINCT RESPONSE IN REGARD TO JURY CHARGES AS JUXTAPOSED WITH VOIR DIRE EXAMINATION OF LAY PERSONS ON THE ISSUE OF PAROLE ELIGIBILITY. A JURY INSTRUCTION IS GIVEN BY THE COURT TO THE JURY TO GUIDE IN AREAS OF LAW. VOIR DIRE EXAMINATION IS TO ELICIT POSSIBLE BIAS OR PREJUDICE IN REGARD TO A PROSPECTIVE JUROR. THIS COURT NOTES WITH INTEREST THAT TORRENCE IS REPLETE WITH REFERENCES TO STATE VERSUS MATTHEWS, 296 SOUTH CAROLINA 379. STATE VERSUS MATTHEWS IS A LENGTHY DISCUSSION OF PAROLE ELIGIBILITY BUT IT HOLDS THAT A CAPITAL DEFENDANT IS NOT ENTITLED TO PROBE POTENTIAL [Tr. 222] JURORS MISCONCEPTIONS ABOUT THE PAROLE ELIGIBILITY OF A PERSON SENTENCED TO LIFE IMPRISONMENT BY ASKING THEM ON VOIR DIRE WHAT A LIFE SENTENCE MEANT TO THEM. TORRENCE DOES NOT OVERRULE MATTHEWS ON THE VOIR DIRE PROHIBITION.

THIS COURT CONCLUDES THAT TORRENCE WILL BE APPLIED WITH FULL EFFICACY AT THE

APPROPRIATE TIME TOGETHER WITH AND CONCOMITANTLY USING SECTION 24-21-640. BUT THIS COURT WILL NOT ALLOW VOIR DIRE EXAMINATION IN REGARD TO PAROLE ELIGIBILITY.

AND IT IS SO ORDERED.

* * *

[Tr. 1571] THE COURT: THANK YOU. THAT TAKES CARE OF THAT. ALL RIGHT. THE NEXT ISSUE DEALS WITH, OBVIOUSLY, A CONSIDERATION OF TORRENCE.

THE SOLICITOR: I WILL NOT BE AS AMENABLE ON THE TORRENCE ISSUE, HOWEVER, YOUR HONOR.

THE COURT: I WANT THE FOCUS TO BE ON JUSTICE CHANDLER'S CONCURRING OPINION IN THAT REGARD. IT'S OBVIOUSLY STATE LAW.

THE SOLICITOR; FOR PURPOSES OF THE RECORD, YOUR HONOR, IF HE – THE DEFENSE HAS BROUGHT MR. BATSON FROM THE DEPARTMENT OF CORRECTIONS HERE TODAY AND IT MAY BE APPROPRIATE SO THAT WE DON'T – I NOTICE THE SUPREME COURT LATELY HAS BEEN HAVING PROBLEMS WITH STIPULATED FACTS IN SOME INSTANCES, SO, IT MAY BE APPROPRIATE TO PUT HIM ON THE STAND BEFORE WE ACTUALLY DISCUSS WHAT THE CASE MEANS. SO [Tr. 1572] WE HAVE A FACTUAL BASIS.

MR. QUINN: YOUR HONOR, MIGHT I PROCEED THEN?

THE COURT: I –

MR. QUINN: OR DOES YOUR HONOR JUST WISH TO HEAR WHAT THE PROFFERED TESTIMONY WOULD BE?

THE COURT: NO, SIR. I WANT A FULL PROFFER MADE BECAUSE I HAVE SOME OPINION NOW AS TO WHAT THE LAW IS AND I'M NOT GOING TO BE BOUND BY COUNSEL IN THIS CASE IN REGARD TO THIS ISSUE. I HAVE CONSIDERED IT IN GREAT DETAIL. I HAVE WRITTEN ON THIS TOPIC PRIOR TO TORRENCE. MY PUBLICATIONS DON'T RECEIVE THAT WIDE DISSEMINATION BUT IN THE C. L. E. PUBLICATIONS I DO HAVE MATERIALS THAT HAVE BEEN PUBLISHED IN REGARD TO THE DEATH PENALTY AREA AND THIS IS A MATTER OF IMPORT TO THE CIRCUIT BENCH AND I AM GOING TO DEAL WITH THIS IN MY OWN FASHION WITHOUT IT BEING A STIPULATED PRESENTATION BY COUNSEL IN THIS CASE BECAUSE I FEEL UNCOMFORTABLE WITH COUNSEL STIPULATING AS TO WHAT TORRENCE MEANS AND THE EFFICACY OF TORRENCE. THAT DOES NOT NEGATE IN THE SLIGHTEST YOUR FULL RIGHT TO PRESENT A PROFFER AND TO GIVE SPECIFICITY FOR THE RECORD BECAUSE THAT'S MY INTENT TO ALLOW THE MATTER TO BE REVIEWED BY THE STATE SUPREME COURT IN REFERENCE TO THIS CASE.

MR. BRUCK: IN THE INTEREST OF TIME, YOUR HONOR, I DON'T THINK IT WAS MR. QUINN'S SUGGESTION THAT THERE BE ANY LEGAL STIPULATIONS. I THINK HIS SUGGESTION AND PERHAPS [Tr.

1573] WE CAN AGREE ON IT IS THAT THE RECORD AS I UNDERSTAND IT ALREADY REFLECTS THAT MR. SIMMONS WAS ON PREVIOUS OCCASIONS CONVICTED OF SEVERAL OFFENSES WHICH ARE CRIMES OF VIOLENCE WITHIN THE MEANING OF OUR STATUTE. I THINK THE RECORD FURTHERMORE REFLECTS –

THE SOLICITOR: I DON'T KNOW THAT THAT'S ACTUALLY BEEN –

MR. QUINN: IT'S BEEN PROFFERED TO THE COURT BUT WE HAVE NOT SUBMITTED TO THE COURT AS EXHIBITS THE CERTIFIED COPIES.

THE COURT: YOU MAY PROFFER THAT.

THE SOLICITOR: WE HAVE THAT IF YOU DON'T.

MR. QUINN: YOUR HONOR, I WOULD THEN PROFFER TO THE COURT FOR A COURT'S EXHIBIT AN INDICTMENT ENTITLED DOCKET NUMBER 91-GS-32-134 FROM LEXINGTON COUNTY CONCERNING JONATHON DALE SIMMONS WHICH WOULD, ON IT'S FACE AND ON THE SENTENCING SHEET ATTACHED, INDICATE THAT MR. SIMMONS WAS CONVICTED OR PLED GUILTY IN THAT CASE TO CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE AND RECEIVED A SENTENCE OF THIRTY (30) YEARS IN LEXINGTON COUNTY ON JUNE 19, 1991.

I WOULD ALSO SUBMIT TO THE COURT INDICTMENT NUMBER 91-GS-32-135, ALSO FROM LEXINGTON COUNTY AGAINST MR. JONATHAN DALE SIMMONS. THE INDICTMENT IS FOR THREE COUNTS,

THE SENTENCING SHEETS ATTACHED WOULD INDICATE THE CONVICTION ON THE CHARGES OF CRIMINAL SEXUAL CONDUCT IN THE [Tr. 1574] FIRST DEGREE AND BURGLARY IN THE FIRST DEGREE. THOSE CONVICTIONS BY WAY OF GUILTY PLEA AND WOULD INDICATE THAT MR. SIMMONS WAS SENTENCED TO THIRTY (30) YEARS ON THE CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE AND LIFE IMPRISONMENT ON THE BURGLARY.

THE COURT: COURT'S EXHIBIT NUMBERS NINE AND TEN.

WHEREUPON, COURT'S EXHIBIT NUMBERS NINE AND TEN, INDICTMENTS/LEXINGTON COUNTY, MARKED INTO THE RECORD AT THIS TIME.)

THE COURT: THANK YOU.

THE SOLICITOR: YOUR HONOR, THOSE ARE COURT'S EXHIBITS?

THE COURT: THAT'S CORRECT.

MR. QUINN: YOUR HONOR, AT THIS TIME, I WOULD CALL MR. BATSON TO THE STAND.

(LARRY CLEVELAND BATSON, FIRST BEING DULY SWORN, TESTIFIED AS FOLLOWS:)

THE CLERK: PLEASE HAVE A SEAT. STATE YOUR FULL NAME FOR THE RECORD, SPELL YOUR LAST, PLEASE?

THE WITNESS: MY NAME IS LARRY CLEVELAND BATSON, B-A-T-S-O-N.

DIRECT EXAMINATION BY MR. QUINN:

Q MR. BATSON, BY WHOM ARE YOU EMPLOYED?

A SOUTH CAROLINA DEPARTMENT OF CORRECTIONS.

Q AND IN WHAT CAPACITY?

[Tr. 1575] A I'M THE GENERAL COUNSEL TO THE DEPARTMENT OF CORRECTIONS.

Q AND IN THAT CAPACITY, HAVE YOU BECOME FAMILIAR WITH CODE SECTIONS 24-21-640 AND CODE SECTION 16-1-60?

A YES, SIR.

Q ALL RIGHT. AND 24-21-640 DEALING WITH LIFE WITHOUT PAROLE FOR A SECOND CONVICTION OF A VIOLENT CRIME?

A YES, SIR.

Q AND 16-1-60 SETTING OUT WHAT VIOLENT CRIMES –

A WHAT CONSTITUTES VIOLENT CRIMES, YES, SIR.

Q AND IS, IN FACT, CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE AND BURGLARY IN THE FIRST DEGREE, ARE EITHER OR BOTH OF THOSE VIOLENT CRIMES IN SOUTH CAROLINA?

A IT WOULD BE MY POSITION THEY ARE BOTH VIOLENT CRIMES, YES, SIR.

Q AND IS MURDER A VIOLENT CRIME IN SOUTH CAROLINA?

A YES, SIR.

Q IF A PERSON WAS CONVICTED FOR MURDER AT A SEPARATE SENTENCING PROCEEDING AFTER HAVING PREVIOUSLY BEEN CONVICTED OF CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE AND BURGLARY IN THE FIRST DEGREE AND HE RECEIVED A LIFE SENTENCE, CAN HE MAX THAT SENTENCE OUT ACCORDING TO THE DEPARTMENT OF CORRECTIONS' POLICY?

A IS IT THE SAME SERIES OF EVENTS?

Q FOR THE PURPOSES OF THIS RECORD, ASSUME THAT IT WOULD [Tr. 1576] NOT BE THE SAME SERIES OF EVENTS?

A SIR, IT WOULD BE OUR POSITION THAT – THAT AS TO THE SECOND SUBSEQUENT VIOLENT CRIME, THAT WOULD NOT BE – THEY WOULD NOT BE ELIGIBLE FOR PAROLE.

Q AND IF THE SECOND VIOLENT CRIME WAS A MURDER CONVICTION UPON WHICH A LIFE IMPRISONMENT SENTENCE WAS RECEIVED, COULD HE MAX OUT THE LIFE IMPRISONMENT SENTENCE?

A IF – BY MAX OUT, DO YOU MEAN WOULD ANY GOOD TIME OR CREDITS ACCRUE TO THAT SENTENCE?

Q YES, SIR. COULD HE REDUCE THAT SENTENCE IN ANY FASHION?

A NO, SIR, THERE ARE – WE TAKE THE POSITION, THE RECORDS DEPARTMENT – THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS TAKES THE POSITION THAT BEFORE GOOD TIME CREDITS CAN BE APPLIED, THERE MUST BE A DEFINITE SENTENCE AND, OF COURSE, A LIFE SENTENCE IS NOT A DEFINITE TERM.

Q BEG THE COURT'S INDULGENCE. SO, IN SHORT, HE WOULD SERVE A SENTENCE OF LIFE WITHOUT PAROLE WHICH WOULD END UPON HIS DEATH?

A ASSUMING THAT THE SECOND CONVICTION NOT RELATED TO THE FIRST VIOLENT OFFENSE WAS FOR A LIFE TERM, YES, SIR.

Q THAT'S ALL I WOULD HAVE OF THIS WITNESS, YOUR HONOR. CROSS-EXAMINATION HARPOOTLIAN.

Q JUST A COUPLE OF QUESTIONS, MR. BATSON. THIS PERSON WOULDN'T BE ELIGIBLE FOR ANY SORT OF EARLY RELEASE PROGRAM?

[Tr. 1577] A NO, I DIDN'T SAY THAT, SIR. I SAID HE WOULD NOT – I SAID HE WOULD NOT BE ELIGIBLE FOR PAROLE.

Q WOULD THERE BE ANY WAY HE COULD BE RELEASED?

A (NO RESPONSE.)

Q LET ME BE MORE SPECIFIC. COULD HE BE RELEASED UNDER THE PROVISION THAT ALLOWS

THE GOVERNOR TO RELEASE PEOPLE IN A – ON AN EMERGENCY?

A UNDER CERTAIN –

Q TECHNICALLY –

A – TECHNICALLY – TO BE VERY CANDID WITH YOU, SOLICITOR, I WOULD HAVE TO CHECK, I REALLY DON'T KNOW. WE HAVE THE REGULATIONS OF THE DEPARTMENT OF CORRECTIONS THAT WOULD PROHIBIT VIOLENT OFFENDERS BEING RELEASED FROM THOSE PROGRAMS, BUT I'M NOT SURE THAT'S STATUTORY. THAT MAY JUST BE OUR REGULATIONS AND IF THEY ARE, THEY, THEY ARE CERTAINLY SUBJECT TO CHANGE, YES, SIR.

Q THEY ARE YOUR REGULATIONS?

A YES, SIR.

Q WHAT ABOUT FOR FURLOUGH? YOU HAVE PEOPLE SERVING LIFE SENTENCE THAT ARE ON FURLOUGH?

A YES, SIR.

Q DO YOU HAVE PEOPLE WHO ARE ON LIFE SENTENCE THAT ARE ON WORK RELEASE?

A OH, YES, SIR.

Q DO YOU HAVE PEOPLE WHO ARE ON LIFE SENTENCE WHO GO [Tr. 1578] FOR AND I DON'T KNOW WHETHER THEY CALL IT FURLOUGHS OR

NOT, WHO ARE RELEASED BACK INTO THE COMMUNITY FOR SPECIFIC PERIODS OF TIME FOR HOLIDAYS, FOR VACATIONS, HOSE [sic] SORTS OF THINGS?

A YES, SIR.

Q THANK YOU.

REDIRECT EXAMINATION BY MR. QUINN:

Q MR. BATSON, LET ME BE SURE WE ARE CLEAR. WOULD A PERSON SERVING A SENTENCE OF LIFE WITHOUT PAROLE BE ELIGIBLE FOR WORK RELEASE PROGRAMS?

A NO, SIR, NOT UNDER OUR REGULATIONS.

Q ALL RIGHT. THE PEOPLE THAT ARE ELIGIBLE FOR WORK RELEASE PROGRAMS ARE THOSE PERSONS SERVING A LIFE SENTENCE THAT ARE COMING UP FOR PAROLE, ISN'T THAT RIGHT?

A YES, SIR, YOU HAVE TO BE BEFORE YOU ARE PAROLE ELIGIBLE UNDER OUR REGULATIONS, YOU HAVE TO BE WITHIN 24 MONTHS OF SOME RELEASE.

Q SO, WOULD A PERSON SERVING LIFE WITHOUT PAROLE BE ELIGIBLE FOR FURLOUGHS UNDER YOUR REGULATIONS?

A SIR, THERE ARE TYPES – THERE ARE DIFFERENT TYPES OF FURLOUGHS, OKAY. FOR A SUPERVISED FURLOUGH, THEY WOULD NOT. NOW, WE HAVE WHAT WE REFER TO IN THE DEPARTMENT OF CORRECTIONS AS HOLIDAY FURLOUGHS. THEY ARE UNDER THE SAME STATUTORY PROVISION AND

ANY INMATE IN DOUBLE A CUSTODY WOULD BE ELIGIBLE FOR THOSE FURLOUGHS. THEY ARE LIMITED [Tr. 1579] DURATION, 72 HOURS, 48 HOURS AT HOLIDAYS. AND IF THEY MADE THAT CUSTODY GRADE, THEY WOULD BE ELIGIBLE FOR THOSE FURLOUGHS, YES, SIR.

Q HAS ANY INMATE SERVING LIFE WITHOUT PAROLE FOR AN AGGRAVATED MURDER BEEN FURLOUGHED FOR ANY REASON THAT YOU ARE AWARE OF –

A NO, SIR –

Q – INCLUDING THIS HOLIDAY FURLOUGH?

A NO, SIR.

Q THAT'S ALL I HAVE. THANK YOU.

RECROSS-EXAMINATION BY MR. HARPOOTLIAN:

Q JUST A COUPLE OF QUESTIONS. ARE THERE ANY LAWS AGAINST AN INMATE SERVING LIFE WITHOUT PAROLE AND BEING FURLOUGHED?

A NO, SIR, THE [sic] ARE REGULATIONS OF THE DEPARTMENT OF CORRECTIONS.

Q ARE THERE ANY LAWS AGAINST AN INMATE SERVING LIFE WITHOUT PAROLE BEING PUT ON WORK RELEASE?

A NO, SIR.

Q ARE THERE ANY LAWS AGAINST AN INMATE WHO WAS ON LIFE – WHO HAS A LIFE WITHOUT PAROLE SENTENCE FROM RECEIVING A HOLIDAY FURLOUGH?

A THERE ARE NO STATUTORY PROHIBITIONS, NO, SIR.

Q SO, BASICALLY WHAT YOU'RE TELLING ME IS THAT THE CURRENT BOARD OF THE DEPARTMENT OF CORRECTIONS REGULATIONS [Tr. 1580] AND IT'S TOTALLY WITHIN THEIR DISCRETION DOESN'T ALLOW WORK RELEASE FOR PEOPLE WHO ARE ON – SERVING A LIFE WITHOUT PAROLE SENTENCE, IS THAT CORRECT?

A THAT'S CORRECT, SIR.

Q NOW, AND SINCE WE ARE TALKING ABOUT THIS TOPIC, LET ME ASK YOU ABOUT THE NELSON SUIT.

A YES, SIR.

Q UNDER THE NELSON SUIT, YOU HAVE TO KEEP – YOU HAVE TO KEEP NO MORE THAN A CERTAIN NUMBER OF INMATES WITHIN AN INSTITUTION, IS THAT CORRECT? BASICALLY, THAT'S PART OF IT?

A YES, THERE ARE SPACE LIMITATIONS, YES, SIR.

Q SPACE LIMITATIONS. ARE WE CURRENTLY BUILDING PRISONS TO ACCOMMODATE THE NELSON SUIT?

A YES, SIR.

Q WILL WE BE EVER WITHIN THE STANDARDS WE HAVE AGREED TO IN THE NELSON SUIT?

A IT'S MY OPINION THAT THERE IS NOT A CHANCE IN THE WORLD, NO, SIR.

Q ALL RIGHT. SO, AS I UNDERSTAND IT, AT THAT POINT, INMATES WILL BE DISCHARGED, IS THAT CORRECT?

A (NO RESPONSE.)

Q AND IF IT'S TOO SIMPLISTIC OF A QUESTION –

A NO, NO, I UNDERSTAND WHAT YOU ARE SAYING, SOLICITOR. THERE IS ALWAYS THE POTENTIAL THAT SHOULD THE COURT DEEM [Tr. 1581] THAT WE ARE OUT OF COMPLIANCE, THE FEDERAL COURT, THAT THE COURT COULD ORDER A RELEASE, YES, SIR.

Q ALL RIGHT. NOW, LET ME MAKE MORE SPECIFIC. CAN YOU TELL ME, WE HAVE A GENTLEMAN OVER HERE, MR. SIMMONS WHO WAS CONVICTED JUST YESTERDAY OF MURDER, BURGLARY AND LARCENY. IT IS HIS SECOND CONVICTION FOR SUCH. UNDER THE OMNIBUS CRIME BILL HE IS TO SERVE LIFE WITHOUT PAROLE, IS THAT CORRECT?

A YES, SIR.

Q AS A STAFF MEMBER OF THE DEPARTMENT OF CORRECTIONS AND CALLED AS AN EXPERT IN THIS CASE, CAN YOU TELL ME THAT HE WILL NEVER EVER SEE THE LIGHT OF DAY OR THAT HE WILL ALWAYS REMAIN BEHIND BARS? BEHIND BARS?

A NO, SIR, I CAN'T SAY THAT.

Q THANK YOU.

THE COURT: ALL RIGHT. ANYTHING FURTHER?

MR. QUINN: BEG THE COURT'S INDULGENCE. NOTHING FURTHER, YOUR HONOR. THANK YOU.

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[Tr. 1583] MR. QUINN: YOUR HONOR, THE PROFFER I WAS ATTEMPTING TO MAKE THROUGH MR. BUNCH AND APPARENTLY THE SOLICITOR MAY BE WILLING AGREE TO ALL OR PART OF THIS IS THAT MR. CARL LUNDBERG WHO IS COUNSEL FOR THE PAROLE BOARD WHO HAD BEEN SERVED A SUBPOENA BUT IS UNAVAILABLE TODAY TO COME TESTIFY WOULD TESTIFY IF PERMITTED THAT THE PAROLE TAKES THE POSITION THEY WILL NOT CONSIDER FOR PAROLE ANYONE SERVING A SENTENCE OF LIFE WITHOUT PAROLE.

THE SOLICITOR: WE WOULD STIPULATE TO THAT, YOUR HONOR.

THE COURT: LET THAT STIPULATION SHOW FOR THE RECORD. THAT OBVIATES THE NECESSITY OF A LAWYER IN THE CASE TESTIFYING.

THE SOLICITOR: AND I APOLOGIZE TO THE COURT FOR INTERRUPTING.

THE COURT: I APPRECIATE IT. YOU WERE OF ASSISTANCE.

THE SOLICITOR: THANK YOU.

MR. QUINN: YOUR HONOR, THE FINAL MATTER I WOULD PROFFER TO THE COURT IS A COURT EXHIBIT. IT IS AN AFFIDAVIT AND POLL CONDUCTED BY MR. ROBERT OLDENDICK, O-L-D-E-N-D-I-C-K, WHICH CONCERNS AND I WILL OFFER IT TO THE COURT IN JUST A SECOND, YOUR HONOR. OBVIOUSLY YOUR HONOR CAN READ IT FOR HIMSELF. BUT FOR THE PURPOSES OF THE RECORD, IT CONCERNS THE BELIEFS OF THE GENERAL PUBLIC AS TO [Tr. 1584] WHAT POSSIBILITY OF RELEASE IF SENTENCED TO LIFE IMPRISONMENT REALLY MEANS, THE AMOUNT OF TIME SPENT IN PRISON IF SENTENCED TO LIFE IMPRISONMENT AND WHAT THE GENERAL PUBLIC REALLY BELIEVES IT MEANS AND FINALLY, THE IMPORTANCE OF KNOWING THE TIME A PERSON WOULD ACTUALLY HAVE TO SERVE BEFORE THE CHANCE OF RELEASE, WHETHER THAT WOULD ENTER INTO THEIR DELIBERATIONS IN A LIFE IMPRISONMENT OR DEATH PENALTY SITUATION.

THE SOLICITOR: NO OBJECTION.

THE COURT: COURT'S ELEVEN.

(WHEREUPON, COURT'S EXHIBIT NUMBER 11, AFFIDAVIT/OLDENDICK, MARKED INTO THE RECORD AT THIS TIME.)

THE COURT: ALL RIGHT.

MR. QUINN: AND THAT IS THE ORIGINAL.

(WHEREUPON, THE DOCUMENT IS HANDED TO THE COURT AT THIS TIME.)

MR. BRUCK: IF, YOUR HONOR, PLEASE, THAT CONCLUDES THE EVIDENTIARY SHOWING THAT THE DEFENSE WISHES TO MAKE. I DON'T KNOW IF THE STATE HAS ANY EVIDENCE TO PRESENT.

THE SOLICITOR: NO, SIR, WE DON'T.

MR. BRUCK: IF, YOUR HONOR, PLEASE? TO BE CLEAR, IT IS NOT THE DEFENSE INTENTION TO CALL ANY WITNESSES ON THIS POINT. THIS IS SIMPLY – IT'S OUR POSITION AND, I [Tr. 1585] THINK, STATE VERSUS TORRENCE ESTABLISHES BEYOND ANY QUESTION THAT THE INELIGIBILITY OF MR. SIMMONS OR ANY OTHER DEFENDANT IN HIS SITUATION FOR PAROLE IS A MATTER OF LAW TO BE DETERMINED BY THE COURT.

THE STATE SUPREME COURT MADE THAT DETERMINATION BASED SIMPLY ON THE RECORD FACTS OF MR. TORRENCE'S PRIOR MURDER CONVICTION IN THE TORRENCE CASE AND, I THINK, TORRENCE, THEREFORE, HAS TO BE READ FOR THE PROPOSITION THAT THIS IS A LEGAL MATTER WHICH THE COURT MUST DETERMINE AND IF THE MATTER IS ONE THAT IS TO BE CHARGED TO THE JURY, THE COURT SHOULD SIMPLY CHARGE IT AS A MATTER OF LAW.

THE COURT: THAT'S WHAT I'M CONCERNED ABOUT, COUNSEL, IN THIS PARTICULAR MATTER WHAT CHARGE WILL I GIVE TO THE JURY?

MR. BRUCK: VERY WELL. THE REQUEST, YOUR HONOR, IS THAT THE COURT CHARGE THE

PROVISIONS, THE RELEVANT PROVISIONS OF 16 – OF 24-21-640.

THE COURT: 24-21-640.

MR. BRUCK: YES. DOWN TOWARDS THE END OF THAT SECTION WHICH READS AS FOLLOWS: THE BOARD MUST NOT, THAT IS, THE BOARD OF PROBATION, PAROLE AND PARDON MUST NOT GRANT PAROLE NOR IS PAROLE AUTHORIZED TO ANY PRISONER SERVING A SENTENCE FOR A SECOND OR SUBSEQUENT CONVICTION FOLLOWING A SECOND SENTENCING FOR A PRIOR CONVICTION FOR VIOLENT CRIMES AS DEFINED IN SECTION 16-1-60.

[Tr. 1586] WE WOULD FURTHER ASK THE COURT TO CHARGE AS A MATTER OF LAW THAT THE OFFENSES OF FIRST DEGREE BURGLARY AND FIRST DEGREE CRIMINAL SEXUAL CONDUCT ARE VIOLENT CRIMES AS DEFINED IN SECTION 16-1-60. THAT IS REQUEST THAT WE ARE MAKING. IT WOULD, THEREFORE, OF COURSE, BE OPENED TO COUNSEL TO ARGUE AND THERE WOULD BE NO CONTROVERSY BUT THAT MR. SIMMONS WILL NOT BE ELIGIBLE FOR PAROLE REGARDLESS OF THE JURY'S SENTENCING DECISION.

THE COURT: WHAT I WOULD LIKE FOR YOU TO ADDRESS MR. BRUCK IS –

MR. BRUCK: YES, SIR –

THE COURT: – SOMETHING THAT I HAVE IN MY MATERIALS THAT I HAVE HERETOFORE REFERRED TO, CONSIDERED AND IS OF CONCERN

TO THE CIRCUIT BENCH. HISTORICALLY WE KNOW THE DEVELOPMENTAL PROCESS AS IT COMES FORWARD IN THE HANDLING OF THE PAROLE ISSUE BEFORE THE JURY. WE HAD A PROCEDURE IN PLACE AND THEN WE COME AND WE HAVE THESE DECISIONS THAT GIVE US A CHANGE IN THE PROCEDURE. THEN WE HAVE AN ANALYTICAL REVIEW BY JUSTICE CHANDLER INSOFAR AS THESE CASES ARE CONCERNED AND I WOULD LIKE FOR YOU TO ADDRESS DIRECTLY HIS LANGUAGE AS IT RELATES TO THE PROHIBITION, APPARENTLY, THAT HE IS ARTICULATING IN REGARD TO CAPITAL SENTENCING JURORS BEING INFORMED ABOUT PAROLE –

MR. BRUCK: YES, SIR.

THE COURT: THE LANGUAGE IS THERE AND I WOULD [Tr. 1587] LIKE FOR YOU TO ADDRESS THAT LANGUAGE. I CAN ENGAGE IN ACADEMIA EXERCISE WITH YOU, BUT THAT'S WHAT I NEED FOR YOU TO ADDRESS.

MR. BRUCK: IT IS OUR POSITION, YOUR HONOR, THAT THE CONCURRING OPINION OF JUSTICE CHANDLER PROHIBITS ONLY THE CHARGING ON PAROLE AND NOT THE CHARGING ON A DEFENDANT'S INELIGIBILITY FOR PAROLE. WE THINK THAT SOME SUPPORT FOR THIS POSITION IS PROVIDED NOT ONLY BY THE LANGUAGE OF THE OPINION ITSELF WHICH TALKED IN TERMS OF CHARGING ON PAROLE, BUT ADDITIONALLY BY THE VERY FACT THE SUPREME COURT REVERSED MR. TORRENCE'S DEATH SENTENCE AND REMANDED FOR A NEW SENTENCING PROCEEDING

AFTER CHARGING THAT MR. TORRENCE WOULD HAVE BEEN INELIGIBLE FOR PAROLE FOR THIRTY YEARS ON A LIFE SENTENCE. IT COULD HARDLY HAVE BEEN THE INTENTION OF THE SUPREME COURT TO REVERSE HIS DEATH SENTENCE FOLLOWING A PROCEEDING AT WHICH THE JURY WAS GIVEN THAT RELATIVELY FAVORABLE CHARGE, THAT IS, NO PAROLE FOR THIRTY YEARS ONLY TO REQUIRE HIM TO BE SENTENCED BY A JURY THAT WAS TO BE TOLD NOTHING ABOUT HIS PAROLE INELIGIBILITY ON RETRIAL.

IN OTHER WORDS, IF THAT WERE THE INTENTION OF THE COURT, THEY WOULD HAVE BEEN REQUIRING A TRIAL THAT WOULD BE – A RETRIAL THAT WOULD BE LESS ADVANTAGEOUS TO MR. TORRENCE THAN THAT WHICH OCCURRED AT THE FIRST TRIAL AND –

THE COURT: WELL, YOU ARGUE THAT IN TORRENCE, BUT [Tr. 1588] WE CANNOT IGNORE THE FACT THAT PRECEDENTIALLY JUSTICE CHANDLER HAS BEEN DISSENTING IN A NUMBER OF CASES INVOLVING THE APPLICABILITY OF ATKINS AND THE USE OF ATKINS BY THE CIRCUIT BENCH. AND HE HAS COME FORWARD IN A LINE OF CASES IN REGARD TO HIS DISSENT TO THE POINT OF TORRENCE.

MR. BRUCK: NO, MY – NO, I THINK I MAY NOT HAVE MADE MYSELF CLEAR, YOUR HONOR.

MY POINT IS THERE ARE TWO DIFFERENT TYPES OF DEFENDANTS WHO MIGHT –

THE COURT: OH, I UNDERSTAND.

MR. BRUCK: – MIGHT BE ASKING FOR CHARGES ON –

THE COURT: I UNDERSTAND THAT. ELIGIBLE AND INELIGIBLE.

MR. BRUCK: THERE ARE THE THIRTY-YEAR DEFENDANTS AND THE NO PAROLE DEFENDANTS.

I UNDERSTAND STATE VERSUS TORRENCE TO SAY THAT FOR THOSE DEFENDANTS WHO ARE ELIGIBLE FOR PAROLE, THE SUBJECT OF PAROLE SHOULD NOT BE RAISED, HOWEVER, THERE IS THE SECOND CATEGORY WHICH IT SO HAPPENS WAS MR. TORRENCE'S OWN SITUATION WHO ARE COMPLETELY INELIGIBLE FOR PAROLE. THAT IS ALSO MR. SIMMONS' SITUATION.

AS TO THOSE DEFENDANTS, I HAVE READ TORRENCE IN VAIN TO FIND ANY INDICATION THAT THE COURT DOES NOT WISH THE TRUTH TO BE TOLD TO THE JURY ABOUT THE INELIGIBILITY OF SUCH DEFENDANTS.

[Tr. 1589] NOW, I WILL ADMIT THIS IS FIRST CASE I HAVE EVER SEEN, AT LEAST IN RECENT YEARS IN WHICH A DECISION OF THE COURT IS HANDED DOWN IN A CONCURRING OPINION AND I WILL ADMIT THAT IT IS NOT CRYSTAL CLEAR AND PRECISELY FOR THAT REASON, I HAVE FILED WITH THE SUPREME COURT A PETITION, A MOTION FOR CLARIFICATION OR IN THE ALTERNATIVE FOR A REHEARING WHICH IS STILL PENDING WHICH BRINGS ME

TO ANOTHER POINT WHICH IS THAT TORRENCE IS NOT FINAL.

THE COURT: YOU ARGUED SOME CASES I CAN'T REMEMBER THEM ALL, COLORADO, ARIZONA.

MR BRUCK: HAS, YOUR HONOR, SEEN THE REHEARING?

THE COURT: I WAS –

MR. BRUCK: YES, THE – THE – AS IT HAPPENS, I SHOULD ADD THAT THE DECISION OF THE SUPREME COURT ON THIS POINT IN TORRENCE CAME, WITH ALL DUE RESPECT, OUT OF THE BLUE. IT WAS NOT REQUESTED BY THE STATE. IT WAS NOT BRIEFED. IT WAS NOT ARGUED. AND, IN FACT, ONE OF THE TWO STATE CASES UPON WHICH THE STATE SUPREME COURT RELIED, NEW MEXICO CASE HAS SINCE BEEN OVERRULED BY THE SUPREME COURT OF NEW MEXICO. SO, THE LAW IS IN CONSIDERABLE FLUX. I HAVE DONE MY RESEARCH SINCE TORRENCE CAME DOWN AND HAVE NOT FOUND A SINGLE STATE IN THE UNION THAT HAS LIFE WITHOUT PAROLE AND YET REFUSES TO TELL THE JURY THAT THE DEFENDANT WILL BE INELIGIBLE FOR PAROLE. IN FACT, MOST STATES THAT HAVE LIFE WITHOUT PAROLE ACTUALLY MAKE THAT FACT PART OF [Tr. 1590] THE VERDICT. THE JURY IS INVITED TO CHOOSE BETWEEN DEATH OR LIFE WITHOUT THE POSSIBILITY OF PAROLE. THAT'S THE SITUATION IN CALIFORNIA AND IN A NUMBER OF OTHER LARGE STATES.

SO, WE – I THINK FOR THE REASONS I'VE TOLD YOU, I DON'T THINK TORRENCE DID WHAT THE STATE PRESUMABLY THINKS THEY DID. I DON'T THINK TORRENCE IS ABOUT PEOPLE IN THIS SITUATION. IF IT WAS, I DON'T THINK THEY WOULD HAVE ORDERED A NEW SENTENCING TRIAL. BUT, FURTHERMORE, ANY AMBIGUITY ON THIS POINT AND TO GIVE THE STATE THEIR DUE, I'LL CONCEDE THAT THERE MAY BE SOME AMBIGUITY. IF THERE WASN'T, I WOULDN'T HAVE ASKED THE SUPREME COURT FOR CLARIFICATION. ANY AMBIGUITY OUGHT TO BE RESOLVED WITH DUE REGARD FOR THE FACT THAT IF THE STATE IS RIGHT, SOUTH CAROLINA WILL BE SETTING FORTH ON UNCHARTED CONSTITUTIONAL WATERS KEEPING THE JURY IN THE DARK ON A POINT WHICH EVERY OTHER STATE THAT I'VE BEEN ABLE TO FIND THAT HAS A SIMILAR LAW LET'S THE JURY KNOW ABOUT AND THERE IS VERY LITTLE DOUBT IN MY MIND THAT THIS CASE, THAT THIS ISSUE, WILL BECOME THE NEXT SKIPPER VERSUS SOUTH CAROLINA FOR ALMOST EXACTLY THE RATIONALE THAT MOTIVATED THE UNITED STATES SUPREME COURT TO REVERSE THE RULE THAT HAD PERTAINED IN SOUTH CAROLINA IN SKIPPER. THAT IS TO SAY, THE FUTURE GOOD BEHAVIOR OF THE DEFENDANT IN PRISON AS A MITIGATING FACTOR. THE – I HAPPEN TO BE AS YOUR HONOR MAY KNOW, THE LAWYER [Tr. 1591] WHO ARGUED THE SKIPPER CASE IN THE UNITED STATES SUPREME COURT, SO, I'M FAIRLY FAMILIAR WITH THE ARGUMENTS THAT THE SUPREME COURT FOUND TO BE CONVINCING AND

ESSENTIALLY, I THINK, A READING OF THE SKIPPER CASE SHOWS THAT THE UNITED STATES SUPREME COURT WHICH HAD LONG HELD THAT THE FUTURE DANGEROUSNESS OF A DEFENDANT IS RELEVANT IN A CAPITAL SENTENCING.

BY THE SAME TOKEN, THE FUTURE NON-DANGEROUSNESS OF A CAPITAL DEFENDANT MUST ALSO BE PERMITTED TO BE CONSIDERED AND, INDEED, THE MORE THAT THE STATE PURPORTS TO SHOW THAT THE DEFENDANT WOULD BE DANGEROUS IN THE FUTURE, THE MORE CRUCIAL IT IS THAT THE JURY HAVE ALL THE RELEVANT INFORMATION TO DETERMINE WHETHER OR NOT THE DEFENDANT, IN FACT, MAY NOT BE ALL THAT DANGEROUS.

NOW, IF THE FACT THAT THE DEFENDANT IS LIKELY TO BE A WELL-BEHAVED PRISON INMATE, IT'S CONSTITUTIONALLY INDISPENSABLE AND SKIPPER SAYS IT IS, THAT HOW MUCH MORE IMPORTANT IS IT THAT THE DEFENDANT WILL REMAIN A PRISON INMATE AND WILL NOT BE ELIGIBLE FOR PAROLE.

NOW, I RECOGNIZE THAT ABSENT AN INSTRUCTION, NOTHING WOULD EVER BE SAID ABOUT PAROLE. HOWEVER, I THINK WE MUST ALSO ACKNOWLEDGE THAT PAROLE IS A MATTER OF COMMON KNOWLEDGE. THAT IS WHAT MOTIVATED THE – THAT RECOGNITION, REGARDLESS OF WHAT YOU DO WITH IT, THAT FACTUAL RECOGNITION MOTIVATED THE SUPREME COURT IN ATKINS IS UNDENIABLE. I [Tr. 1592] THINK ANYONE – ANY

ADULT IS AWARE OF THE EXISTENCE OF SUCH A THING AS PAROLE AND ANYONE WHO REMEMBERS THE WILLIE HORTON CAMPAIGN OF 1988 KNOWS THAT THIS IS MATTER OF GREAT PUBLIC CONTROVERSY AND CONCERN. BUT WE DIDN'T WANT TO REST ON WHAT WE THINK THE PUBLIC KNOWS OR THE PEOPLE IN THE JURY BOX KNOW OR WHAT WE THINK EVERYONE KNOWS THE PUBLIC KNOWS AND FOR THIS REASON, WE COMMISSIONED THE POLL BY DR. OLDENDICK WHICH YOUR HONOR NOW HAS BEFORE YOU WITHOUT OBJECTION. AND THIS POLL, INDEED, IT IS A STATEWIDE POLL MADE BY A PROFESSIONAL POLLING ORGANIZATION. THE WAY THE POLL WAS CONDUCTED IS SET FORTH IN THE DOCUMENT. THE POLL DID NOT SIMPLY POLL ALL RESIDENTS OF SOUTH CAROLINA BUT REQUIRED THAT THE PERSON POLLED HAVE – BE, AS NEAR AS COULD BE DETERMINED, BE ELIGIBLE FOR JURY DUTY IN THAT THEY WERE REQUIRED TO SAY THEY WERE EITHER REGISTERED VOTERS OR HAD VALID SOUTH CAROLINA DRIVERS LICENSE. THEY WERE THEN IN A VERY SIMPLE PRELIMINARY WAY DEATH QUALIFIED AND LIFE QUALIFIED. THE RESPONDENTS IN THE POLL WERE ASKED WHETHER THEY WOULD ALWAYS VOTE FOR THE DEATH PENALTY – I'M PARAPHRASING – YOUR HONOR HAS THE EXACT WORDING BEFORE YOU – IN ALL CASES OF MURDER OR WHETHER THEY WOULD NEVER VOTE FOR IT AND, OUT OF AN ABUNDANCE OF CAUTION, THE RESULTS WERE TABULATED BOTH FOR ALL JURY ELIGIBLE RESPONDENTS AND ALSO FOR ONLY THOSE WHO SAID

THAT THEY WOULD NEITHER, ALWAYS NOR NEVER VOTE FOR THE DEATH PENALTY, BUT THOSE WHO [Tr. 1593] WOULD SUPPORT THE DEATH PENALTY DEPENDING ON THE CIRCUMSTANCES OF EACH INDIVIDUAL CASE WHICH IS ROUGH MEASURE. I REALIZE THAT THERE ARE FINE SHADES THAT WE CAN ARGUE ABOUT, BUT AS A ROUGH MEASURE, I THINK, THAT IS AN ACCURATE DESCRIPTION OF THE SORTS OF SOUTH CAROLINIANS WHO SIT OR WHO ARE ELIGIBLE TO SIT ON CAPITAL INJURIES – JURIES.

THE INITIAL RESPONSE TO THE MATERIAL QUESTIONS THAT WERE PUT TO THIS SAMPLE OF 504 WHICH IS STATISTICALLY A VERY LARGE SAMPLE, 504 SOUTH CAROLINIAN DEATH QUALIFIED OR DEATH PENALTY JURY ELIGIBLE RESPONDENTS WAS WHETHER A PERSON WHO IS CONVICTED FOR MURDER IN SOUTH CAROLINA – IF A PERSON IS SENTENCED TO LIFE, DOES THIS MEAN THEY WILL HAVE TO SPEND THE REST OF LIFE IN PRISON OR CAN THEY BE RELEASED FROM PRISON AT SOME POINT IN THE FUTURE. THE RESPONSE WAS THAT THEY WOULD – TWENTY PERCENT SAID THAT THEY WOULD HAVE TO SPENT [sic] THE REST OF THEIR LIFE AND 71.6 PERCENT SAID THAT THEY CAN BE RELEASED AT SOME POINT.

THE NEXT QUESTION WAS IF YOU HEARD THAT SOMEONE WAS SENTENCED BY A COURT IN SOUTH CAROLINA TO LIFE IMPRISONMENT FOR COMMITTING A MURDER, ABOUT HOW MUCH TIME DO YOU THINK THEY WOULD HAVE TO SPEND IN PRISON?

THIS WAS AND – THIS – THEY WERE THEN PERMITTED TO ANSWER ANY NUMBER OF YEARS. AND AS YOUR HONOR WILL NOTICE FROM TABLE TWO, THE RESPONSES ARE ALL OVER THE LOT FROM ONE YEAR TO [Tr. 1594] 80. INTERESTINGLY, ALTHOUGH, TWENTY PERCENT INITIALLY SAID THAT THEY WOULD HAVE TO SPEND THEIR WHOLE LIFE, WHEN ASKED THE SECOND QUESTION, ONLY 7 PERCENT SAID THE REST OF THEIR LIFE AND THE REST OF THE OTHER – A THIRD SAID THEY DIDN'T KNOW AND THEN YOU SEE THE PERCENTAGES. SIX PERCENT, THE FIRST LARGE NUMBER THOUGHT IT WOULD BE TEN YEARS; 14.2 PERCENT TWENTY. AND WHEN THEY ARE BROKEN DOWN INTO CATEGORIES, 15.6 PERCENT EXPECTED THAT IT WOULD BE LESS THAN TEN YEARS; 32 PERCENT THOUGHT 10 TO 19 YEARS; 24.7, 20 TO 29 YEARS AND ONLY 14.9 SAID THIRTY OR MORE.

NOW, WE ARE DEALING HERE WITH A PERSON WHO, IN FACT, WILL NEVER BE ELIGIBLE FOR RELEASE. ONLY 7.1 PERCENT WHICH IS ALMOST A INSIGNIFICANT NUMBER OF THIS VERY LARGE SAMPLE OF JURY ELIGIBLE PEOPLE GUESSED THAT THAT IS THE SITUATION.

THEN THE LAST QUESTION THAT WAS ASKED WAS WHETHER – WAS WHETHER THEY THOUGHT IT WAS EXTREMELY – WELL, I'LL READ THE QUESTION INTO THE RECORD. AS YOU MAY KNOW IN SOUTH CAROLINA, THE JURY NORMALLY DECIDES WHETHER TO SENTENCE A CONVICTED MURDERER TO LIFE IMPRISONMENT OR THE DEATH PENALTY. IF YOU WERE ON A JURY AND HAD TO MAKE THAT

DECISION, HOW IMPORTANT WOULD IT BE FOR YOU TO KNOW HOW MUCH THE PERSON WOULD HAVE TO SPEND IN PRISON BEFORE THEY WOULD HAVE A CHANCE TO BE RELEASED IF YOU SENTENCED THEM TO LIFE IMPRISONMENT? EXTREMELY IMPORTANT, VERY IMPORTANT, [Tr. 1595] SOMEWHAT IMPORTANT, NOT TOO IMPORTANT OR NOT AT ALL IMPORTANT. AND HERE, I THINK, WE HAVE THE CONFIRMATION IN EXACTLY WHAT I TOLD YOU BEFORE ABOUT SKIPPER VERSUS SOUTH CAROLINA. 43 PERCENT SAID EXTREMELY IMPORTANT AND ANOTHER 33.5 PERCENT SAID VERY IMPORTANT FOR A TOTAL OF MORE THAN THREE QUARTERS. WE THINK IT WOULD BE EXTREMELY OR VERY IMPORTANT TO KNOW WHEN THE DEFENDANT WOULD BE RELEASED.

SO YOU HAVE A SITUATION IN WHICH JURIES OR AT LEAST CITIZENS OF SOUTH CAROLINA, FIRST OFF THINK ERRONEOUSLY IN THIS CASE. INDEED, ERRONEOUSLY WRONG IN ALL CASES THAT DEFENDANTS CAN BE RELEASED AFTER RELATIVELY SHORT PERIODS OF TIME AND THE LARGE MAJORITY OF WHOM THINK IT IS EXTREMELY IMPORTANT OR VERY IMPORTANT TO KNOW HOW SOON SOMEBODY CAN BE RELEASED. IT WOULD REQUIRE A VERY, VERY GOOD REASON TO JUSTIFY KEEPING THE JURY IN THE DARK WHEN THE ANSWER IS PRINTED IN THE CODE IN BLACK AND WHITE. THE CORRECT ANSWER IS THAT MR. SIMMONS MAY NEVER BE RELEASED FROM HIS SENTENCE OF LIFE IMPRISONMENT IF HE IS SENTENCED – IF HIS LIFE IS SPARED.

THE COURT: IS IT MAY NEVER AS YOU'VE JUST USED THE PHRASE OR IS IT INELIGIBLE FOR PAROLE?

MR. BRUCK: INELIGIBLE FOR PAROLE. NOW, I AM NOT CONCERN [sic] ABOUT THE VERBIAGE. IF THE COURT FELT IT WAS MORE APPROPRIATE TO CHARGE THE JURY THAT HE IS – HE WILL BE INELIGIBLE FOR PAROLE FOR HIS ENTIRE LIFETIME OR WHATEVER [Tr. 1596] THE LANGUAGE THAT THE COURT THINKS IS MOST APPROPRIATE, THAT WOULD BE FINE WITH US. IT IS NOT THE LANGUAGE OF THE STATUTE BUT THE EFFECT OF THE STATUTE THAT WE THINK THIS JURY NEEDS TO KNOW. THE EVIDENCE BEFORE THIS JURY IS THAT MR. SIMMONS HAS COMMITTED THIS AGGRAVATED MURDER AND HAS ALSO COMMITTED THE CRIMES ABOUT WHICH THEY HAVE ALREADY HEARD INVOLVING OTHER ELDERLY LADIES. THE STATE IS ARGUING THAT HE SHOULD BE SENTENCED TO DEATH. THE QUESTION WILL AS SURELY AS WE ARE HERE IN THIS COURTROOM TODAY, THE QUESTION WILL ARISE IN THE JURY ROOM IF WE DON'T SENTENCE HIM TO DEATH, WHAT THEN. EVERYONE IN THIS ROOM KNOWS THE ANSWER, BUT WE ARE NOT THE ONES DOING THE SENTENCING. THE PEOPLE THAT NEED TO KNOW THE ANSWER ARE THE ONES WHO HAVE THE RESPONSIBILITY TO SENTENCE.

I WOULD SUBMIT TO YOU THAT IF YOUR HONOR DOES NOT TELL THE JURY WHAT THE ANSWER TO THAT QUESTION IS, THEY WILL PROVIDE THE ANSWER FOR THEMSELVES. NOW, IT IS POSSIBLE, IT HAPPENS IN MAYBE HALF THE CASES

THAT THE JURY WILL COME OUT AND ASK YOU FOR FURTHER GUIDANCE AND, IF SO, SURELY THE COURT WOULD THEN, I WOULD HOPE, CHARGE THEM THAT MR. SIMMONS COULD NOT BE CONSIDERED FOR PAROLE UNDER THE STATUE. BUT THE REAL DANGER IS THAT THEY WILL DECIDE THAT QUESTION ON THEIR OWN BASED ON WHAT THEY HAVE SEEN ON T.V., BASED ON WHAT –

THE COURT: WELL, MR. BRUCK, YOU ARE CONTINUING [Tr. 1597] TO ARGUE IN REGARD TO A POLL. I AM MORE CONCERNED WITH THE EFFICACY OF THE LANGUAGE USED BY JUSTICE CHANDLER. I AM BOUND BY JUSTICE CHANDLER'S OPINION NOW. IF IT DOES NOT MEAN ANYTHING IN THIS CASE, THAT'S ONE THING OR IF IT'S NOT APPOSITE OR INAPPOSITE –

MR. BRUCK: YES, SIR –

THE COURT: – THAT'S ANOTHER THING.

THE SOLICITOR: YOUR HONOR, MIGHT I ASK ONE QUESTION AND MAYBE MR. BRUCK – I'VE BEEN WILLING TO CONCEDE ONE ISSUE THIS AFTERNOON, I MIGHT BE WILLING TO CONCEDE ANOTHER IF HE COULD EXPLAIN TO ME WHY JUSTICE CHANDLER ON PAGE 27 OF THIS OPINION SAYS IN CONCLUSION FOR ALL OF THE STATED REASONS, I WOULD OVERRULE ATKINS TO THE EXTENT THAT IT PERMITS THE INTRODUCTION OF PAROLE IN A CAPITAL SENTENCING DECISION. CONCURRED WITH BY GREGORY, HARWELL AND TOAL.

MR. BRUCK: THE – I WILL RESPOND TO THAT. AND IT'S THE SAME RESPONSE THAT I HAVE ALREADY MADE. WE ARE NOT INTRODUCING PAROLE. WE ARE INTRODUCING THE UNAVAILABILITY OF PAROLE AND THERE IS VERY BIG DIFFERENCE. IF THIS – IF THIS WERE A CASE LIKE ATKINS AND WE WERE ASKING FOR A CHARGE OF – WELL, NO – IF THIS WERE A CASE LIKE MANY AND WE WERE ASKING FOR THE JURY TO BE CHARGED THAT MR. SIMMONS WOULD BE INELIGIBLE FOR PAROLE FOR A PERIOD OF THIRTY YEARS, THEN I WOULD NOT BE ABLE TO RESPOND [Tr. 1598] TO THAT. THE STATE LAW WHEN IT BECOMES FINAL, AS IT IS NOT NOW IN TORRENCE, WOULD SUSTAIN THE SOLICITOR'S POSITION.

THE SOLICITOR: MIGHT I ASK ONE OTHER QUESTION? THEN YOUR POSITION IS IF WE WERE DEALING WITH SOMEONE WHO DID NOT HAVE A PRIOR CONVICTION FOR A VIOLENT CRIME IS THAT THE JURY SHOULD BE A TOLD HE'S ELIGIBLE FOR PAROLE IN THIRTY YEARS?

MR. BRUCK: UNDER TORRENCE, MY POSITION WOULD BE THAT I AM BOUND OR AT LEAST WHEN TORRENCE BECOMES FINAL, IF IT DOES, THAT I WOULD BE BOUND BY TORRENCE. WE SUBMIT THAT THAT IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT AND WHICH THE RECORD SO REFLECT BUT I COULD NOT BE ABLE TO ARGUE TO A CIRCUIT JUDGE THAT THAT INSTRUCTION SHOULD BE GIVEN IN THE LIGHT OF TORRENCE WERE IT FOUND.

THE SOLICITOR: WELL, I'M JUST TRYING TO FIND A CONSISTENCY HERE. WE'RE GOING TO TELL JURIES WHERE THERE IS NO PRIOR CONVICTION THAT IT'S A TWENTY-YEAR ELIGIBILITY IF YOU DON'T FIND AN AGGRAVATING CIRCUMSTANCE; A THIRTY-YEAR ELIGIBILITY IF YOU FIND AN AGGRAVATING CIRCUMSTANCE OR IN THIS CASE NONE OR IS IT JUST WHERE WE HAVE DEFENDANTS THAT AREN'T ELIGIBLE. IS IT YOUR POSITION THAT UNDER TORRENCE THAT JUSTICE CHANDLER'S OPINION WOULD BE INAPPROPRIATE? AND THAT, I GUESS, IS THE DILEMMA HERE.

MR. BRUCK: OH, OH. ALL RIGHT. MY POSITION WOULD BE, FOR ANYBODY WHO IS INTERESTED, IS THAT THE [Tr. 1599] EXCLUSION OF PAROLE INELIGIBILITY UNDER ANY CIRCUMSTANCES VIOLATES THE EIGHTH AMENDMENT. HOWEVER, WITH RESPECT TO THE FIRST CATEGORY, THE PEOPLE THAT ARE ELIGIBLE AFTER TWENTY OR THIRTY YEARS, THAT ARGUMENT IS, FOR NOW, FORECLOSED BY TORRENCE. HOWEVER –

THE SOLICITOR: WELL, LET ME ASK YOU THIS AND YOU MADE AN ARGUMENT JUST A MOMENT AGO THAT WE OUGHT TO ALLOW JURORS TO KNOW ABOUT THIS BECAUSE THEY ARE GOING TO TALK ABOUT IT ANYWAY. ONE OF THE CARDINAL PRINCIPLES OF THE CONSTITUTION IS THAT NO ONE SHOULD HAVE TO TESTIFY AGAINST THEMSELVES. THE JUDGE YESTERDAY TOLD THE JURY THEY SHOULDN'T CONSIDER IN ANY WAY THE FACT THAT THE DEFENDANT DIDN'T TAKE THE STAND. WOULDN'T IT BE – MAKE MORE SENSE TO

HAVE THE JUDGE TELL THE JURY PAROLE OR THE POSSIBILITY THEREOF IS NONE OF YOUR CONCERN. A PROPHYLACTIC CHARGE SUCH AS THAT WOULD ELIMINATE THIS ENTIRE ISSUE FROM THE JURY'S MINDS AND CERTAINLY IF THE SUPREME COURT HAS UPHELD THAT PROPHYLACTIC CHARGE TO ELIMINATE – WE ALL KNOW IF YOU DID A POLL ON PEOPLE'S OPINIONS ON DEFENDANTS THAT DON'T TAKE THE STAND, I THINK, 75 PERCENT OF THEM WOULD SAY IT'S BECAUSE THEY ARE HIDING SOMETHING, BECAUSE THEY HAVE A RECORD, BECAUSE THERE'S SOME REASON FOR THEM NOT TO TESTIFY.

YOUR HONOR, I GUESS, I'M PERHAPS DEALING OR ENGAGING IN ACADEMIC DEBATE WITH MR. BRUCK AND THAT'S NOT [Tr. 1600] THE ISSUE. I THINK THAT WE OUGHT TO STICK TO – I UNDERSTAND HE'S FILED A PETITION FOR REHEARING. WE BELIEVE STATE VERSUS TORRENCE IS THE LAW. WE BELIEVE JUSTICE CHANDLER'S OPINION IS THE LAW. HIS OPINION IS THAT ATKINS IS OVERRULED TO THE EXTENT THAT IT PERMITS INTRODUCTION OF PAROLE INTO THE CAPITAL SENTENCING PROCESS. THREE OTHER JUSTICES HAVE AGREED WITH HIM. WE'D ASK YOU TO NOT ALLOW THE ARGUMENT, ANY ARGUMENT BY STATE OR DEFENSE ABOUT PAROLE AND NOT CHARGE THE JURY ON ANYTHING CONCERNING PAROLE. THAT'S OUR POSITION. WE WOULD ASK YOU TO GO AHEAD AND RULE ON THAT. WE ONLY HAVE A FEW MORE HOURS BEFORE WE HAVE TO START THE RE-SENTENCING PROCESS. AND MR. BRUCK IS VERY ARTICULATE. HE'S BEEN IN FRONT OF THE SUPREME

COURTS. HE ARGUES DAILY IN FRONT OF THE HIGHEST BENCHES IN THIS – OF JUDGES IN THIS COUNTRY AND I'M SURE HE IS ARTICULATE AND REASONED WELL BEYOND MY MEANS, HOWEVER –

THE COURT: PUNDITIC.

THE SOLICITOR: PUNDITIC. HOWEVER, WE – I JUST – AND HIS POLL IS INTERESTING AND I HAVEN'T OBJECTED TO IT, BUT, AGAIN, I WOULD ASK THAT WE GET BACK TO THE POINT. WHAT IS THERE TO INDICATE AND WE CAN DEBATE WHETHER THE GLASS IS HALF FULL OR HALF EMPTY ALL DAY LONG. THIS IS – THAT'S NOT THE ISSUE. I SUGGEST WE GET ON WITH THE MATTER. WE HAVE SOME EVIDENTIARY MATTERS WE WANT TO TALK ABOUT HERE IN JUST A MOMENT, YOUR HONOR.

[Tr. 1601] THE COURT: ALL RIGHT.

MR. BRUCK: I'VE EXPLAINED AS BEST I CAN WHY I DON'T THINK TORRENCE CONTROLS. IN VIEW OF THAT, I THINK, WE ARE BOUND BY THE CONSTITUTIONAL PRECEPT AND I QUOTE FROM MCCLUSKEY VERSUS KEMP THAT "STATES CANNOT LIMIT THE SENTENCERS CONSIDERATION OF ANY RELEVANT CIRCUMSTANCE THAT COULD CAUSE IT TO DECLINE TO IMPOSE THE DEATH PENALTY". I'M ACTUALLY QUOTING FROM JUSTICE REHNQUIST'S OPINION IN PAYNE VERSUS TENNESSEE WHEN HE QUOTES THE MACLOSITY DECISION ON THAT POINT. THAT IS A PRINCIPLE OF EIGHTH AMENDMENT LAW AND BETTER ESTABLISHED THAN ANY OTHER IN THE AREA OF THE DEATH PENALTY AND

WE SUBMIT THAT AN ACCURATE INSTRUCTION INFORMING THE JURY THAT THIS MAN WILL NEVER BE ELIGIBLE FOR PAROLE IF HIS LIFE IS SPARED IS CONSTITUTIONALLY MANDATED. IT IS NOT FORECLOSED BY ATKINS AND WE REQUEST THAT IT BE GIVEN.

THANK YOU.

THE COURT: ORDER. THE ISSUE BEFORE THE COURT IS THE QUESTION OF PAROLE OR INELIGIBILITY OF PAROLE OF THE DEFENDANT IN THIS CASE. WHAT SHOULD THE JURY BE TOLD IN THAT REGARD, IF ANYTHING? THE CIRCUIT BENCH HAS BEEN ENTRUSTED WITH THE DUTY AND RESPONSIBILITY OF THE TRIAL OF DEATH PENALTY CASES AND THE DIFFICULT ISSUE OF PAROLE IN THAT TRIAL SETTING. A PLETHORA OF AUTHORITY EXISTS IN SOUTH CAROLINA EMANATING FROM THE SOUTH CAROLINA SUPREME [Tr. 1602] COURT CONSISTING OF STATE VERSUS LARRY GENE BELL, OPINION NUMBER 23163, FILED FEBRUARY 26, 1990: STATE VERSUS RAYMOND PATTERSON, JR., OPINION NUMBER 23060, FILED AUGUST 14, 1989; STATE VERSUS ANDREWS LAVERNE SMITH, OPINION NUMBER 23016, FILED MAY 30, 1989; STATE VERSUS DONALD ALLEN JONES, OPINION NUMBER 22978, FILED MARCH 6, 1989: STATE VERSUS MATTHEWS, 296 SOUTH CAROLINA 379; 373 SOUTHEASTERN 2ND, 587, CERTIORARI DENIED; 109 SUPREME COURT, 1559; STATE VERSUS JERRY WILLIAM PLEMMONS, P-L-E-M-M-O-N-S, 296 SOUTH CAROLINA, 76; 370 SOUTHEASTERN, 2ND, 871; STATE VERSUS FRANK MIDDLETON, 295 SOUTH CAROLINA, 3318; 368

SOUTHEASTERN 2ND, 457, CERTIORARI DENIED; 109 SUPREME COURT, 189, REHEARING DENIED; 109 SUPREME COURT, 406; STATE VERSUS RICHARD CHARLES JOHNSON, 293 SOUTH CAROLINA, 321; 360 SOUTHEASTERN, 2ND, 317; STATE VERSUS JOSEPH EARNEST ATKINS, A-T-K-I-N-S, 293 SOUTH CAROLINA, 294; 360 SOUTHEASTERN, 2ND, 302; STATE VERSUS PETERSON, 287 SOUTH CAROLINA, 244; 335 SOUTHEASTERN, 2ND, 800; STATE VERSUS SOUTH, 285 SOUTH CAROLINA, 529; 331 SOUTHEASTERN, 775; CERTIORARI DENIED; 474 UNITED STATES, 888; STATE VERSUS NORRIS, 285 SOUTH CAROLINA, 86; 328 SOUTHEASTERN, 2ND, 339 AND STATE VERSUS COPELAND, 278 SOUTH CAROLINA, 572; 300 SOUTHEASTERN, 2ND, 63.

THE DEFENDANT IN THE CASE, SUB JUDICE CONTENDS THAT HIS INELIGIBILITY OF PAROLE STATUS SHOULD BE PRESENTED [Tr. 1603] TO THE JURY AS A VALID SENTENCING FACTOR. THE DEFENDANT REQUEST [sic] THE COURT TO CHARGE SECTION 24-21-640 OF THE CODE OF LAWS OF SOUTH CAROLINA, 1976 AND TO CHARGE THAT FIRST DEGREE BURGLARY AND CRIMINAL SEXUAL CONDUCT OF THE FIRST DEGREE ARE VIOLENT CRIMES. IT IS CONTENDED BY THE DEFENDANT THAT THE EXCLUSION OF THE DEFENDANT'S INELIGIBILITY FOR PAROLE VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

EDIFYING AND ENLIGHTENING IS THE RECENT PRONOUNCEMENT BY THE STATE SUPREME COURT IN REGARD TO THE ISSUE OF PAROLE ELIGIBILITY

ARTICULATED IN STATE VERSUS MICHAEL R. TORRENCE, T-O-R-R-E-N-C-E, OPINION NUMBER 23403, FILED MAY 20, 1991. TORRENCE REVEALS THE REVIEW BY THE STATE SUPREME COURT OF MAJOR PRINCIPLES OF LAW IMPACTING UPON THE TRIAL OF CASES IN THE GENERAL SESSIONS VENUE. THE HISTORIC PRINCIPLE OF IN FAVOREM VITAE IS REVIEWED IN DETAIL. AN INTERESTING STUDY AND ANALYSIS OF THAT PRINCIPLE IS PRESENTED BY THE SAGACIOUS JUSTICE TOAL. ASSOCIATE JUSTICE CHANDLER WRITING FOR THE COURT WHICH HAS THE CONCURRENCE OF CHIEF JUSTICE GREGORY, CHIEF JUSTICE ELECT HARWELL AND ASSOCIATE JUSTICE TOAL.

TORRENCE STATES, "I AGREE WITH THE CONCLUSION IN PART THREE THAT THE CHARGE OUTLINED IN STATE VERSUS ATKINS, 293 SOUTH CAROLINA, 294; 360 SOUTH CAROLINA, 2ND, 302 (1987) DOES NOT ACCURATELY REFLECT THE PAROLE INELIGIBILITY [Tr. 1604] OF THIS DEFENDANT SHOULD HE RECEIVE A LIFE SENTENCE. SEE F. CALDWELL VERSUS MISSISSIPPI, 472, UNITED STATES, 320; 336, 105 SUPREME COURT, 2633, 2643, 86 LAWYERS EDITION, 2ND, 231, 243-44 (1985). I WRITE SEPARATELY BECAUSE I BELIEVE WE SHOULD RECONSIDER ATKINS AND REINSTATE EARLIER PRECEDENT PROHIBITING CAPITAL SENTENCING JURIES FROM BEING INVOLVED ABOUT PAROLE. FOR FORTY YEARS PRIOR TO ATKINS, THIS COURT'S DECISIONS CONSISTENTLY DISAPPROVED THE PRACTICE OF PLACING THE SUBJECT OF PAROLE BEFORE THE JURY IN A DEATH PENALTY CASE. IN

STATE VERSUS HINTON, H-I-N-T-O-N, 210 SOUTH CAROLINA, 480; 43 SOUTHEASTERN, 2ND, 360 (1947) CAPITAL CONVICTIONS WERE REVERSED IN PART UPON THE SOLICITOR'S CLOSING ARGUMENT TO THE EFFECT "THAT IF THE DEFENDANTS WERE FOUND GUILTY OF MURDER BUT RECOMMENDED TO LIFE IMPRISONMENT THAT THIS WOULD NOT NECESSARILY MEAN . . . THEY WOULD SERVE A LIFE SENTENCE" ID AT 488, 43 SOUTHEASTERN, 2ND AT 363, WE COULD FIND NO JUSTIFICATION FOR SUCH ARGUMENT WHICH SUGGESTED TO THE JURY THAT A VERDICT OF DEATH "SHOULD BE RENDERED BECAUSE SOME OTHER DEPARTMENT OF THE STATE GOVERNMENT MIGHT SHORTEN OR COMMUTE A LIFE SENTENCE" ID MORE THAN TWENTY YEARS LATER, STATE VERSUS ATKINSON, 253 SOUTH CAROLINA, 531; 172 SOUTHEASTERN, 2ND, 111 (1970) ADDRESS THE APPROPRIATE RESPONSE TO A CAPITAL JURY'S QUESTION ABOUT THE POSSIBILITY OF PARDON OR OR [sic] PAROLE IN THE EVENT OF A LIFE SENTENCE. "WE ADOPTED THE [Tr. 1605] PREVAILING VIEW . . . THAT A JURY CHARGED WITH RESPONSIBILITY OF ASSESSING THE PENALTY TO BE SUFFERED BY AN ACCUSED SHOULD NOT BE INVITED BY INSTRUCTION OR ARGUMENT TO SPECULATE ON THE POSSIBLE EFFECT OF PARDON OR PAROLE UPON THE EXECUTION OF THE SENTENCE IMPOSED" ID AT 534, 172 SOUTHEASTERN, 2ND AT 112, THE RATIONALE FOR THIS VIEW WAS EXPRESSED AS FOLLOWS: THE LEGISLATURE COMMITTED TO THE JURY THE RESPONSIBILITY TO DETERMINE IN THE FIRST INSTANCE WHETHER

PUNISHMENT SHOULD BE LIFE OR DEATH. IT CHARGED ANOTHER AGENCY WITH THE RESPONSIBILITY OF DECIDING HOW A LIFE SENTENCE SHALL BE EXECUTED. THE JURORS PERFORM THEIR TASK COMPLETELY WHEN THEY DECIDE THE MATTER ASSIGNED TO THEM UPON THE EVIDENCE BEFORE THEM. WHAT HAPPENS THEREAFTER IS NO CONCERN OF THEIRS . . . THE HOLDING IN ATKINSON SERVED AS A BASIS FOR NUMEROUS DECISIONS CONCERNING THE INTRODUCTION OF PAROLE INTO THE SENTENCING PHASE OF THE BIFURCATED TRIAL PROVIDED UNDER OUR PRESENT DEATH PENALTY LAW. ALL THESE DECISION [sic] UNEQUIVOCALLY STATE THAT PAROLE IS NOT A PROPER CONSIDERATION FOR CAPITAL SENTENCING JURIES . . . FINALLY, STATE VERSUS NORRIS, 285 SOUTH CAROLINA, 86; 328 SOUTHEASTERN, 2ND, 339 (1985) SET OUT THE PROPER RESPONSE TO JURORS IN QUERY ABOUT PAROLE ELIGIBILITY. "WHEN THE ISSUE IS RAISED, THE COURT SHOULD INSTRUCT THE JURY THAT IT SHALL NOT CONSIDER PAROLE ELIGIBILITY IN REACHING ITS DECISION AND THAT THE TERMS [Tr. 1606] "LIFE IMPRISONMENT", "DEATH SENTENCE" SHOULD BE UNDERSTOOD IN THEIR ORDINARY AND PLAIN MEANING . . . IN ATKINS, THIS COURT FOLLOWED ESTABLISHED PRECEDENT HOLDING THE DEFENDANT'S REQUEST FOR INSTRUCTIONS ON PAROLE ELIGIBILITY WAS PROPERLY REFUSED. WITHOUT DISCUSSION, THE COURT PROCEEDED TO SET OUT THE FOLLOWING GUIDELINES TO BE APPLIED PROSPECTIVELY: . . . THESE INSTRUCTIONS ARE INCOMPATIBLE NOT

ONLY WITH THE RATIONALE OF THE SUBSTANTIAL BODY OF LAW PRECEDING ATKINS, BUT ALSO WITH THAT OF OUR DECISIONS WHICH FOLLOWED. "ASIDE FROM THIS LOGICAL INCONSISTENCY, THE ATKINS INSTRUCTIONS PRESENT PRACTICAL PROBLEMS IN THEIR APPLICATION. THE TRIAL COURT IS, IN EFFECT, REQUIRED TO RULE UPON A PARTICULAR DEFENDANT'S ELIGIBILITY FOR PAROLE BEFORE SENTENCE HAS EVEN BEEN IMPOSED. THIS DETERMINATION MAY INVOLVE NOVEL ISSUES OF LAW OR STATUTORY PROVISIONS WHICH HAVE NOT BEEN INTERPRETED. MOREOVER, THERE IS NO WAY TO BE ASSURED THAT THE PAROLE BOARD WOULD REACH THE SAME CONCLUSION AS THE COURT. FOR ALL OF THE STATED REASONS, I WOULD OVERRULE ATKINS TO THE EXTENT IT PERMITS THE INTRODUCTION OF PAROLE INTO THE CAPITAL SENTENCING DECISION."

THIS COURT IS COGNIZANT OF THE FACT THAT TORRENCE DOES NOT DEAL DIRECTLY WITH THE INELIGIBILITY STATUS OF THIS DEFENDANT, HOWEVER, THERE IS NO EPIPHANY NEEDED TO RECOGNIZE THAT TORRENCE IS INSTRUCTIVE TO THE CIRCUIT BENCH [Tr. 1607] IN REGARD TO THE HANDLING OF PAROLE AT THE TRIAL LEVEL. IN CONTRARIETY TO ARGUMENT OF DEFENSE COUNSEL, I CONCLUDE THAT TORRENCE SHOULD BE APPLIED IN THIS CASE. THEREFORE, IT IS ORDERED THAT COUNSEL IN THE MATTER SUB JUDICE SHALL NOT ENGAGE IN ANY DISCUSSION OR REFERENCE TO PAROLE OR PAROLE ELIGIBILITY OR PAROLE INELIGIBILITY.

FURTHER, THIS COURT WILL NOT INSTRUCT THE JURY IN THE INITIAL CHARGE. IN THE EVENT THAT THE JURY INQUIRIES [sic] ABOUT THE MATTER, THE COURT WILL USE THE PROCEDURE ARTICULATED IN STATE VERSUS JOHN FOSTER NORRIS, 328 SOUTHEASTERN, 2ND, 339. THE INSTRUCTION AT THAT TIME WILL BE AS FOLLOWS: "YOU ARE INSTRUCTED NOT TO CONSIDER PAROLE OR PAROLE ELIGIBILITY IN REACHING YOUR VERDICT. DO NOT CONSIDER PAROLE OR PAROLE ELIGIBILITY. THAT IS NOT A PROPER ISSUE FOR YOUR CONSIDERATION.

THE TERMS "LIFE IMPRISONMENT" AND "DEATH SENTENCE" ARE TO BE UNDERSTOOD IN THEIR PLAIN AND ORDINARY MEANING."

AND IT IS SO ORDER [sic]. RIGHTS ARE RESERVED. RIGHTS ARE PROTECTED FOR PURPOSES OF APPELLATE REVIEW.

MR. BRUCK: IF YOUR HONOR, PLEASE, FOR THE RECORD, THERE ARE A COUPLE OF OTHER MATTERS TO RESPOND TO YOUR RULING IF I MIGHT?

THE COURT: YES, SIR.

MR. BRUCK: I WOULD LIKE TO MAKE CLEAR AS I MAY [Tr. 1608] NOT HAVE DONE THAT THE CONSTITUTIONAL BASIS OF THE DEFENDANT'S REQUEST WAS NOT ONLY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION BUT ALSO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AND SPECIFICALLY THE RIGHT TO REBUT

EVIDENCE OF FUTURE DANGEROUSNESS OR MORE GENERALLY THE RIGHT TO REBUT EVIDENCE IN AGGRAVATION PRESENTED BY THE STATE. I WOULD LIKE THE RECORD TO REFLECT THAT.

FURTHERMORE, IN VIEW OF YOUR RULING THAT COUNSEL MAY NOT ARGUE PAROLE ELIGIBILITY, I WOULD, OF COURSE, RESPECTFULLY EXCEPT TO THE RULING AND ADDITIONALLY NOTE THE DEFENDANT'S OBJECTION TO THAT RULING UNDER THE SIXTH AMENDMENT RIGHT TO COUNSEL OF THE UNITED STATES CONSTITUTION.

FURTHERMORE, IN VIEW OF YOUR HONOR'S RULING, I HAVE TWO ADDITIONAL MOTIONS TO MAKE. ONE IS THAT THE COURT ISSUE ITS ORDER IN LIMINE BARING [sic] THE PROSECUTION FROM ARGUING TO THE JURY ANY MATTERS CONCERNING THE ALLEGED FUTURE DANGEROUSNESS, PROCLIVITY FOR VIOLENCE OR LIKELIHOOD TO COMMIT FUTURE ACTS OF VIOLENCE BY THE DEFENDANT JONATHAN SIMMONS; AND SECONDLY, THAT THE COURT INSTRUCT THE JURY THAT THE QUESTION OF THIS DEFENDANT'S FUTURE BEHAVIOR IS NOT A PROPER MATTER FOR THEIR CONSIDERATION AND THEY SHOULD PUT THAT MATTER ENTIRELY OUT OF THEIR MINDS WHILE DECIDING THE ISSUE OF SENTENCE.

IF THE COURT WOULD REQUIRE A WRITTEN INSTRUCTION [Tr. 1609] IN ORDER TO RULE ON THAT REQUEST, WE CAN FURNISH ONE BY TOMORROW. IF NOT, THEN I WOULD ASK OF THE COURT INDICATE

WHETHER THOSE TWO REQUESTS WILL BE GRANTED OR DENIED.

THE COURT: MR. SOLICITOR.

THE SOLICITOR: PLEASE THE COURT, YOUR HONOR? I THINK THE CASE LAW IS CLEAR THAT I'M ALLOWED TO ARGUE POTENTIAL – FUTURE POTENTIAL. PLUS MY UNDERSTANDING OF SKIPPER IS AND MR. BRUCK HAVING ARGUED SKIPPER IN FRONT OF THE UNITED STATES SUPREME COURT MAY KNOW BETTER THAN I, BUT MY UNDERSTANDING IS THAT FUTURE ADAPTABILITY TO PRISON LIFE IS SOMETHING HE WOULD ARGUE AND BE ALLOWED TO PRESENT TESTIMONY ON. BY THAT CHARGE WOULD HE BE, IN EFFECT, WAIVING HIS RIGHTS UNDER SKIPPER?

MR. BRUCK: I SHOULD CLARIFY THE REQUEST. THE REQUEST WAS TO CORRESPOND TO PROHIBITION OF ARGUMENT. IT WAS NOT GOING TO FUTURE ADAPTABILITY BUT TO FUTURE ACTS OF VIOLENCE OR –

THE COURT: I DECLINE TO RULE ON THAT MATTER. MY DECLINATION IS BOTTOMED AND PREMISED UPON THE FACT THAT I DO NOT HAVE SUFFICIENT INFORMATION TO RULE ON THAT MATTER UNTIL A CHARGE IS PRESENTED UNDER THE RULES.

MR. BRUCK: YES, SIR. THAT'S WITH RESPECT TO THE REQUEST OF CHARGE. AM I TO UNDERSTAND THAT YOUR HONOR HAS RULED ON THE OR THAT YOU INTEND TO RULE ON THE REQUEST TO

PROHIBIT THE SOLICITOR FROM ARGUING FUTURE DANGEROUSNESS OR [Tr. 1610] POSSIBLE ACTS OF FUTURE VIOLENCE?

THE COURT: I'M GOING TO LET HIM BE HEARD IN THAT REGARD.

THE SOLICITOR: YOUR HONOR, I BELIEVE, THE CASE LAW ALLOWS ME TO ARGUE DETERRENCE. I BELIEVE OUR SUPREME COURT HAS INDICATED THAT IS APPROPRIATE. GIVEN A FEW MOMENTS, I THINK, I COULD PROBABLY FIND A CASES [sic] THAT DEAL WITH THAT INCH. BUT I WOULD SUBMIT TO YOU THAT –

MR. BRUCK: WHILE MR. HARPOOTLIAN IS SEARCHING, IF I MIGHT MAY [sic] CLEAR THAT THE CONSTITUTIONAL BASIS OF THIS REQUEST REGARDING THE SOLICITOR'S ARGUMENT IS THE DUE PROCESS PRINCIPLE OF GARDNER VERSUS FLORIDA THAT A DEFENDANT MAY NOT BE SENTENCED TO DEATH ON THE BASIS OF INFORMATION THAT HE IS DENIED THE OPPORTUNITY TO DISPROVE OR REBUT.

THE COURT: THE CASE THAT YOU LOOK FOR, COUNSEL, I WOULD HELP YOU IS STATE VERSUS TRUESDALE, 393 SOUTHEASTERN, 2ND, 168 (1990) STATE SUPREME COURT CASE IN CASE YOU CAN'T PUT YOUR HAND ON THAT RIGHT NOW.

THE SOLICITOR: YES, SIR. I CAN PUT MY HANDS ON IT IN ABOUT TWO SECONDS. BUT MY UNDERSTANDING IS UNDER – YOUR HONOR, AS AND YOU'RE, OBVIOUSLY, AS IS ALWAYS, CORRECT.

STATE VERSUS JOE LEWIS TRUESDALE OR LEWIS JOE TRUESDALE, JR. OUR SUPREME COURT SAYS THAT TRUESDALE CHALLENGED THE SOLICITOR'S CLOSING ARGUMENT IN TWO [Tr. 1611] PARTICULARS. FIRST, HE CONTENDS THE SOLICITOR IMPROPERLY REFERRED TO THE DETERRENT EFFECT OF CAPITAL PUNISHMENT. OUR DECISION HOLDS, HOWEVER, THAT THE DETERRENCE ARGUMENT IS PROPER IN THE SENTENCING PHASE OF A CAPITAL TRIAL. STATE VERSUS JONES, 298 SOUTH CAROLINA 118, ETC.

NEXT, TRUESDALE CONTENDS THAT A REFERENCE TO OTHER CRIMINALS WAS WITHOUT SUPPORT IN THE RECORD AND CONSTITUTED EXPRESSION OF THE SOLICITOR'S PERSONAL OPINIONS. THE SOLICITOR ARGUED IN HIS ARGUMENT IS OUTLINED IN THAT DECISION. THIS ARGUMENT MERELY EMPHASIZED THAT TRUESDALE'S CRIMES WERE UNCHARACTERISTIC AND UNPREDICTABLE AND, THEREFORE, TRUESDALE WAS MORE FRIGHTENING THAN CAREER CRIMINALS. COMMENTS DO NOT COMPARE THE ROLE OR MERITS OF THIS PROSECUTION WITH OTHERS AND DISTINGUISH THEM FROM THESE HELD IMPERMISSIBLE WITH STATE VERSUS BUTLER.

IF THIS IS THE ARGUMENT THAT COUNSEL IS ATTEMPTING TO PROHIBIT IN LIMINE, I INTEND ON AND WOULD LIKE NOT TO BE PROHIBITED FROM MAKING THESE KINDS OF ARGUMENTS. I UNDERSTAND THE LIMITS. I'VE READ ALL OF THE CASES OR EXCERPTS TO THE CASES CONCERNING CLOSING ARGUMENTS. I'M NOT GOING TO TALK ABOUT

REMORSE. I'M NOT GOING TO TALK ABOUT PUTTING SIGNS UP ON THE COUNTY LINE. I'M NOT GOING TO TALK ABOUT NEVER PROSECUTING ANOTHER CAPITAL CASE. THERE ARE A NUMBER OF THINGS. I KNOW WHAT I'M NOT SUPPOSE TO TALK ABOUT. I THINK I DO HAVE SOME IDEA [Tr. 1612] WHAT I CAN TALK ABOUT HAVING DONE, PROSECUTED AROUND NINE OF THESE AND DEFENDED ONE IN MY CAREER. BUT THIS PARTICULAR OBJECTION, I DON'T BELIEVE, IS GOVERNED BY OR PROHIBITED BY OUR STATE SUPREME COURT.

MR. BRUCK: AS IT HAPPENS, YOUR HONOR, THAT IS NOT WHAT I WAS REFERRING TO ALTHOUGH MR. HARPOOTLIAN HAS OPENED A – I THINK ANOTHER CAN OF DUE PROCESS WORMS WHICH I THINK MR. QUINN HAD INTENTION – INTENDED ON DEALING WITH TOMORROW IN THE NORMAL COURSE AND PERHAPS THAT WOULD MAKE MORE SENSE. THERE ARE TWO DIFFERENT TYPES OF ARGUMENTS ABOUT DETERRENCE. THERE IS THE ARGUMENT OF GENERAL DETERRENCE. THAT IS TO SAY IF YOU EXECUTE THIS PERSON, IT MAY HELP REDUCE OTHER MURDERS. THAT WAS NOT WHAT I WAS REFERRING TO. BUT I ALSO THINK IN SOUTH CAROLINA THAT IS UNCONSTITUTIONAL FOR THE SIMPLE REASON THAT UNDER STATE LAW A DEFENDANT WHO IS PROHIBITED FROM INTRODUCING RELEVANT AND SCIENTIFICALLY VALID EVIDENCE TO DISPROVE IT.

MR. SIMMONS WOULD IF PERMITTED UNDER SOUTH CAROLINA LAW CALL – INTRODUCE EXPERT TESTIMONY BY A CRIMINOLOGIST WHICH WOULD

ESTABLISH THAT THERE IS NO BASIS UPON WHICH TO BELIEVE THAT THE DEATH PENALTY HAS A SUPERIOR GENERAL DETERRENT EFFECT TO THE PENALTY OF LIFE IMPRISONMENT. AND, IN FACT, WE SO MOVE RECOGNIZING, OF COURSE, THAT A LARGE NUMBER OF SOUTH CAROLINA'S DECISIONS BEGINNING WITH STATE VERSUS WOOMER HAVE PROHIBITED THE [Tr. 1613] ADMISSION OF THAT SORT OF EVIDENCE.

THE COURT: I WILL PRESERVE THE –

THE SOLICITOR: YOUR HONOR, PERHAPS I CAN SAVE SOME TIME ON THIS. I DON'T KNOW THAT I'M GOING TO ARGUE GENERAL DETERRENCE.

THE COURT: ALL RIGHT.

THE SOLICITOR: I DON'T KNOW THAT. I AM GOING TO ARGUE THAT ELECTROCUTING THIS YOUNG MAN OVER HERE WILL DETER HIM FROM ANY FURTHER CRIME AND, I THINK, THAT IS APPROPRIATE.

MR. BRUCK: WELL, OKAY. THAT GETS US TO WHAT I WAS ACTUALLY TALKING ABOUT BUT BEFORE I DO, I – MR. HARPOOTLIAN DID BRING UP THE ARGUMENT ABOUT GENERAL DETERRENCE. WE WOULD LIKE TO PROFFER TOMORROW MORNING IF WE COULD, THE TRANSCRIPT OF THE TESTIMONY OF PROFESSOR PATERNOSTER, P-A-T-E-R-N-O-S-T-E-R, WHICH WAS HEARD IN WOOMER. I'LL ADMIT THAT IT WAS EXPRESSLY DISAPPROVED BY OUR SUPREME COURT IN WOOMER. HOWEVER, IT –

OUR VIEW THAT IT SHOULD BE ADMITTED WHENEVER THE PROSECUTOR INTENDS TO ARGUE THE CONTRARY PROPOSITION. NOW, MR. HARPOOTLIAN NOW INFORMS US THAT HE'S NOT GOING TO ARGUE GENERAL DETERRENCE, OF COURSE, WE WON'T KNOW THAT UNTIL HE ARGUES.

THE COURT: JUST HAVE THAT READY FOR THE RECORD.

MR. BRUCK: YES, SIR. ON THE ARGUMENT OF THE SPECIFIC DETERRENCE, THAT IS, DETERRENCE OF MR. SIMMONS, [Tr. 1614] NORMALLY I WILL CONCEDE THAT THAT IS PROPER ARGUMENT, HOWEVER, IT IS IMPOSSIBLE FOR MR. SIMMONS FOR THE REASONS I'VE OUTLINE [sic] AND WILL NOT, OF COURSE, REPEAT TO RESPOND TO THAT ARGUMENT UNLESS THE JURY IS GIVEN ACCURATE AND FULL INFORMATION ABOUT WHERE IT IS THAT MR. SIMMONS WILL SPEND THE REST OF HIS LIFE, NAMELY IN PRISON DUE TO HIS INELIGIBILITY FOR PAROLE. AND FOR THAT REASON, WE THINK, THAT THE BASIC DUE PROCESS RIGHT OF REBUTTAL IN GARDNER VERSUS FLORIDA MEANS THAT BECAUSE THE COURT HAS AND I RESPECT YOUR HONOR'S RULING DECLINED TO GIVE SUCH AN INSTRUCTION, IT BECOMES AN INDEPENDENT CONSTITUTIONAL VIOLATION OF MR. SIMMONS' RIGHTS FOR MR. HARPOOTLIAN TO ARGUE SPECIFIC DETERRENCE AND BY IMPLICATION MS. [sic] SIMMONS' FUTURE DANGEROUSNESS BECAUSE WE JUST CAN'T MEET THAT ARGUMENT.

THE SOLICITOR: WELL, YOU HONOR, THAT'S FALLACIOUS. HE COULD KILL SOMEBODY JUST AS PEEWEE GASKINS DID IN PRISON. WE ARE NOT TALKING ABOUT DETERRENT – WHEN I TALK ABOUT DETERRING HIM, I'M TALKING ABOUT DETERRING HIM FROM KILLING ANY OTHER HUMAN BEING. AND JUST BECAUSE PEEWEE GASKINS BLEW UP TYNER DOESN'T MEAN AND HE WAS SERVING A LIFE SENTENCE I MIGHT POINT OUT AT THAT TIME, SEVERAL OF THEM. THAT'S FALLACIOUS. WE WOULD LIKE TO MOVE ON TO OTHER ISSUES IF POSSIBLE, YOUR HONOR.

THE COURT: WELL, LET ME CLEAR THE RECORD SO AS [Tr. 1615] TO PROTECT ALL RIGHTS. ADDENDUM TO THE ORDER. THE COURT SPECIFICALLY CONSIDERS THE ARGUMENT AS POSITED BY COUNSEL IN REFERENCE TO THE SIXTH AMENDMENT AND THE FOURTEENTH AMEND. THE ARGUMENT IS REJECTED AND IT IS SO ORDER [sic].

MR. BRUCK: UH – DO I UNDERSTAND THAT YOUR HONOR HAS ALSO DECLINED OUR MOTION IN LIMINE TO PROHIBIT THE SOLICITOR FROM ARGUING THE FUTURE DANGEROUSNESS OF MR. SIMMONS?

THE COURT: NO, SIR, YOU – MAYBE WE ARE NOT ON THE SAME CIRCUIT. YOU OBJECTED TO MY ORDER AS ARTICULATED INTO THE RECORD AND YOU WANTED ME TO COVER OTHER THINGS. DID I NOT UNDERSTAND THAT?

MR. BRUCK: YES, SIR.

THE COURT: AND I WAS TRYING TO GIVE YOU PROTECTION SO AS TO RULE SPECIFICALLY ON THOSE. I HAD REFERRED WITH SPECIFICITY TO THE EIGHTH AMENDMENT IN MY ORDER AND YOU SAID YOU ALSO WERE RELYING ON THE SIXTH AMENDMENT, THE FOURTEENTH AMENDMENT –

MR. BRUCK: YES, SIR –

THE COURT: – AND I JUST WANTED TO PUT ON THE RECORD THAT I REJECT THOSE.

MR. BRUCK: VERY WELL.

THE COURT: I HAD LET YOU LAWYERS ENGAGE IN WHAT IS CALLED PERIPHRASIS.

THE SOLICITOR: I'M SORRY, YOUR HONOR?

[Tr. 1616] THE COURT: PERIPHRASIS. I'LL SPELL IT FOR YOU.

THE SOLICITOR: I WAS GOING TO CHALLENGE YOU TO DO THAT, YOUR HONOR.

THE COURT: P-E-R-I-P-H-R-A-S-I-S, WEBSTER. I MEAN I KNOW I COME FROM BUCOLIC BACKGROUND, FLORENCE COUNTY OUT IN THE COUNTRY. I UNDERSTAND THAT.

THE SOLICITOR: I WOULD NOTE THAT IS THE SAME COUNTY OF OUR CHIEF JUSTICE ELECT, YOUR HONOR, FOR WHOEVER MIGHT READ THIS RECORD DOWN THE LINE. A LONG LINE OF OUTSTANDING JURISTS HAVE COME FROM THAT COUNTY. ARE WE DONE?

MR. BRUCK: WE WILL – I WILL REDUCE THE OTHER MOTIONS I MADE IN WRITING, YOU HONOR. I THINK, MR. QUINN IS SUBMITTING THEM IN THE MORNING.

THE COURT: AND THE REQUESTED CHARGE, NOW NEEDS TO BE IN WRITING, COUNSEL, FOR THE RECORD.

MR. BRUCK: YES, SIR. VERY WELL.

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[Tr. 1648] MR. QUINN: YOUR HONOR, I HAVE A FEW OTHER MATTERS BEFORE WE PROCEED.

THE COURT: OKAY. ALL RIGHT.

MR. QUINN: YOUR HONOR, I HAVE REDUCED MOST OF THE MOTIONS THAT I HAVE MADE IN THIS TRIAL TO WRITING AND WE WILL NEED TO ARGUE A COUPLE OF THOSE IN JUST A MOMENT. BUT BASED ON YOUR HONOR'S RULINGS YESTERDAY, I HAVE TWO MOTIONS I WOULD LIKE TO PUT IN THE RECORD.

FIRST, THAT THE DEFENDANT REQUEST AT THIS POINT IN VIEW OF YOUR HONOR HAVING DECLINED TO INSTRUCT THE JURY CONCERNING THE DEFENDANT'S STATUTORY INELIGIBILITY FOR THE PAROLE, THAT THE COURT ISSUE AN ORDER AT THIS TIME PROHIBITING THE COUNSEL FROM THE STATE FROM ARGUING OR IMPLYING THAT THE DEFENDANT WILL POSE A RISK OF FUTURE VIOLENT BEHAVIOR TO SOCIETY UNLESS SENTENCED TO DEATH. THIS MOTION IS BASED ON GARDNER

VERSUS FLORIDA WHICH WAS CITED YESTERDAY AND YOUR HONOR HAS THE CITE AND THE HOLDING IN GARDNER THAT NO DEFENDANT SHOULD BE A [sic] SENTENCED TO DEATH BASED UPON ANY CONSIDERATION THAT HE IS PRECLUDED FROM EXPLAINING OR REBUTTING.

[Tr. 1649] THE COURT: YES, MR. SOLICITOR.

THE SOLICITOR: I THOUGH YOU RULED ON THAT YESTERDAY, YOUR HONOR.

THE COURT: WELL, I GAVE THEM THE RIGHT TO PRESENT A SPECIFIC REQUEST INSOFAR AS THE RECORD IS CONCERNED.

THE SOLICITOR: AND I WOULD ASK YOU TO RULE TODAY THE SAME WAY YOU RULED YESTERDAY.

THE COURT: THE REQUEST BY THE DEFENSE IS DENIED WITH THIS CAVEAT. OBVIOUSLY, I WILL LISTEN CAREFULLY TO THE ARGUMENT OF THE SOLICITOR TO SEE IF IT CONTRAVENES THE ACTUAL FACTUAL CIRCUMSTANCE. CERTAINLY, I RECOGNIZE THE RIGHT OF THE STATE TO ARGUE CONCERNING THE DEFENDANT'S DANGEROUS PROPENSITY. I WILL NOT ALLOW THE SOLICITOR, FOR EXAMPLE, TO SAY TO THE JURY ANYTHING THAT WOULD INDICATE THAT THE DEFENDANT IS NOT GOING TO BE JAILED FOR THE PERIOD OF TIME THAT IS ENCOMPASSED WITHIN THE ACTUAL LAW. THE FACT THAT WE DO NOT SUBMIT THE PAROLE ELIGIBILITY TO THE JURY DOES NOT NEGATE THE FACT THAT THE SOLICITOR

MUST STAY WITHIN THE TRIAL RECORD. TO SUM UP, THE SOLICITOR MUST STAY WITHIN THE TRIAL RECORD.

THE SOLICITOR: YOUR HONOR, I AT THIS POINT THEN WOULD URGE THE COURT TO REMIND DEFENSE COUNSEL THAT UNDER STATE VERSUS RICHARD STEWART, THEY ARE NOT TO MAKE ANY REPRESENTATIONS TO THE JURY AS TO WHAT SENTENCE MAY MEAN OR [Tr. 1650] NOT MEAN. IN THAT CASE, YOU REMEMBER THE DEFENSE ATTORNEY TOLD THE JURY HE WILL REMAIN IN JAIL FOR THE REST OF HIS NATURAL LIFE.

THE COURT: THAT IS CORRECT. NO QUESTION ABOUT THAT. WHAT'S YOUR NEXT MATTER, COUNSEL?

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[Tr. 1653] [THE COURT:] MR. FOREMAN AND MEMBERS OF THE JURY, PLEASE, [Tr. 1654] PLEASE, GIVE ME YOUR ATTENTION. YOU HAVE FOUND THE DEFENDANT, JONATHAN DALE SIMMONS, GUILTY OF MURDER. WE NOW HOLD THIS TRIAL. IN THIS TRIAL, THE ISSUE IS PRESENTED TO YOU, WHAT SENTENCE SHALL YOU GIVE TO THE DEFENDANT, JONATHAN DALE SIMMONS? TWO OPTIONS. ONE, LIFE IMPRISONMENT; TWO, DEATH PENALTY. WE NOW PROCEED WITH THE PRESENTATION OF THIS MATTER TO YOU.

PLEASE, PLEASE, PLEASE, GIVE IT YOU URGENT ATTENTION.

MR. SOLICITOR, YOU ARE RECOGNIZED.

THE SOLICITOR: PLEASE THE COURT, YOUR HONOR? AT THE OUTSET, YOUR HONOR, WE WOULD MOVE TO INCORPORATE ALL OF THE EVIDENCE, TESTIMONY AND EXHIBITS WHICH THE STATE INTRODUCED IN THE FIRST PHASE OF THIS TRIAL, THAT, IS THE GUILT OR INNOCENCE STAGE, INTO THE RECORD FOR THE JURY'S CONSIDERATION AS TO THIS PORTION OF THE TRIAL.

THE COURT: THAT IS GRANTED WITH THIS SPECIFIC RULING. ALL RIGHTS ARE PROTECTED; ALL RIGHTS ARE RESERVED IN REGARD TO PRIOR RULINGS MADE IN THAT TRIAL PROCEEDING. AND IT IS SO ORDER [sic].

THE SOLICITOR: PLEASE THE COURT, YOUR HONOR? AT THIS TIME, I WOULD REQUEST THE COURT'S PERMISSION TO PUBLISH CERTAIN MATTERS TO THE JURY.

THE COURT: YOU MAY PROCEED. PLEASE IDENTIFY THE EXHIBIT NUMBER.

[Tr. 1655] THE COURT [sic]: YOUR HONOR, THEY ARE COURT'S EXHIBIT. I WILL DESCRIBE THEM.

THE COURT: PROCEED.

THE SOLICITOR: AND AS I UNDERSTAND IT THE DOCUMENTS THEMSELVES WILL NOT BE SUBMITTED TO THE JURY MERELY MY PUBLICATION.

THE COURT: THAT'S CORRECT.

THE SOLICITOR: THE FIRST ONE IS AN INDICTMENT 91-GS-32-134, THE STATE OF SOUTH

CAROLINA, COUNTY OF LEXINGTON. THE STATE VERSUS JONATHAN DALE SIMMONS. IT IS AN INDICTMENT FOR CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE. IT ALLEGES THAT JONATHAN DALE SIMMONS DID IN LEXINGTON COUNTY ON OR ABOUT JUNE 15, 1990 COMMIT THE CRIME OF CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE UPON THE VICTIM, ESTELLE SIMMONS, A 71-YEAR-OLD WIDOW. IN THAT JONATHAN DALE SIMMONS DID WILLFULLY, FELONIOUSLY AND UNLAWFULLY ENGAGE IN SEXUAL INTERCOURSE WITH THE VICTIM AND WHILE DOING SO DID USE PHYSICAL FORCE AND OR PHYSICAL VIOLENCE OF A HIGH AND AGGRAVATED NATURE TO OVERCOME THE VICTIM AND TO ACCOMPLISH THE AFOREMENTIONED SEXUAL BATTERY IN VIOLATION OF SECTION 16-3-652 OF THE 1976 SOUTH CAROLINA CODE OF LAWS AS AMENDED. AGAINST THE PEACE AND DIGNITY OF THE STATE, AND CONTRARY TO THE STATUTE IN SUCH CASE MADE AND PROVIDED. SIGNED BY THE SOLICITOR.

THE RECORD FURTHER – THE INDICTMENT FURTHER [Tr. 1656] INDICATES THAT THE DEFENDANT, JONATHAN D. SIMMONS WAS PUT TO THE BAR AND UPON HIS ARRAIGNMENT PLED GUILTY TO CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE ON JUNE 19, 1991.

THE SECOND DOCUMENT, YOUR HONOR, FOR THE RECORD IS AN INDICTMENT 91-GS-32-135, THE STATE VERSUS JONATHAN DALE SIMMONS. THE INDICTMENT ALLEGES THAT JONATHAN DALE SIMMONS DID IN LEXINGTON COUNTY ON OR ABOUT

AUGUST 2, 1989, COMMIT THE CRIME OF CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE UPON THE VICTIM, MS. MARIE FURTICK, A 71-YEAR-OLD WIDOW IN THAT JONATHAN DALE SIMMONS DID WILLFULLY, FELONIOUSLY AND UNLAWFULLY ENGAGE IN SEXUAL INTERCOURSE WITH THE VICTIM AND WHILE DOING SO DID USE PHYSICAL FORCE AND OR PHYSICAL VIOLENCE OF A HIGH AND AGGRAVATED NATURE TO OVERCOME THE VICTIM AND TO ACCOMPLISH THE AFOREMENTIONED SEXUAL BATTERY IN VIOLATION OF SECTION 16-3-652 OF THE 1976 SOUTH CAROLINA CODE OF LAWS AS AMENDED.

ALSO, THAT JONATHAN DALE SIMMONS DID IN LEXINGTON COUNTY OR [sic] ABOUT AUGUST 2, 1989, ENTER THE DWELLING OF ANOTHER WITHOUT CONSENT TO WIT: THE RESIDENCE OF MS. MARIE FURTICK LOCATED AT 3082 PRINCETON ROAD WITH INTENT TO – PRICETON [sic] ROAD WITH THE INTENT TO COMMIT A CRIME THEREIN ACCOMPANIED BY CIRCUMSTANCES OF AGGRAVATION TO WIT: THE DEFENDANT, JONATHAN DALE SIMMONS, DID CAUSE GREAT AND SEVERE PHYSICAL INJURY TO THE VICTIM, MS. MARIE FURTICK AS INDICATED BY THE CRIMINAL SEXUAL CONDUCT COUNT. AND THE [Tr. 1657] ENTERING AND OR REMAINING OCCURRED DURING THE NIGHTTIME HOURS IN VIOLATION OF 16-11-311, 1976 SOUTH CAROLINA CODE OF LAWS AS AMENDED. AGAINST THE PEACE AND DIGNITY OF THE STATE, AND CONTRARY TO THE STATUTE IN SUCH CASE MADE AND PROVIDED.

FURTHER, THE COURT RECORD INDICATES, YOUR HONOR, THAT THE DEFENDANT, JONATHAN SIMMONS, WAS PUT TO THE BAR AND ARRAIGNED AND UPON HIS ARRAIGNMENT PLED GUILTY TO THE CHARGES OF CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE AND BURGLARY IN THE FIRST DEGREE ON JUNE 19, 1991, IN LEXINGTON COUNTY.

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[Tr. 1878] MRS. SHEALY: MR. BOYLE, I JUST HAVE A COUPLE MORE QUESTIONS. EARLIER WHEN I WAS ASKING YOU ABOUT YOUR PRIOR EXPERIENCE, I THINK, YOU INDICATED YOU WORKED OUT AT THE DEPARTMENT OF CORRECTIONS?

A YES, THAT'S CORRECT.

Q OKAY. IF YOU COULD TELL THE JURY, PLEASE, WHAT YOU DID OUT THERE?

A OKAY. AS I MENTIONED EARLIER, INITIALLY – FOR THE FIRST YEAR I WAS WITH THE DEPARTMENT OF CORRECTIONS, I WORKED IN THE MENTAL HEALTH UNIT FOR THE DEPARTMENT OF CORRECTIONS TAKING CARE OF IN-PATIENT PSYCHIATRIC CLIENTS. I THEN MOVED TO CENTRAL CORRECTIONAL INSTITUTION IN COLUMBIA AS A SOCIAL WORKER IN A UNIT CALLED THE TRANSITIONAL CARE UNIT, THE MISSION OF WHICH WAS TO TAKE INMATES WHO WERE HAVING DIFFICULTY ADJUSTING TO LIVING WITHIN THE DEPARTMENT OF CORRECTIONS AND PROVIDE THEM WITH THE KIND OF THE COPING SKILLS AND KNOWLEDGE AND SO

FORTH THAT THEY NEEDED TO ADJUST TO PRISON LIFE.

[Tr. 1879] Q AND AS A PART OF PREPARING FOR YOUR SOCIAL HISTORY IN THIS CASE, I BELIEVE, YOU INDICATED YOU REVIEWED THE RECORDS OF JONTHAN [sic] SIMMONS FROM THE RICHLAND COUNTY DETENTION CENTER?

A YES, MA'AM, I DID.

Q OKAY. COULD YOU TELL THE JURY, PLEASE, WHAT DIFFICULTIES JONATHAN HAD AT THE DEPARTMENT OF – EXCUSE ME, AT THE RICHLAND COUNTY DETENTION CENTER WHEN HE WAS FIRST INCARCERATED?

A DURING HIS INITIAL, COUPLE OF MONTHS OF INCARCERATION, THERE WERE SOME REPORTED SUICIDE ATTEMPTS WHICH WERE BELIEVED BY MENTAL HEALTH AUTHORITIES TO BE MANIPULATIVE. THERE WAS ONE REPORT OF JONATHAN EATING FECES AND THERE WAS ALSO A REPORT OF ONE CONFRONTATION WITH THE DETENTION CENTER OFFICERS, APPARENTLY NOT A VERY SERIOUS ONE. THEY DON'T GO INTO ANY DETAIL ABOUT IT.

Q OKAY. DO YOU RECALL THE LAST DATE THAT HE HAD ANY PROBLEM AT THE RICHLAND COUNTY DETENTION CENTER?

A I DO NOT RECALL THE EXACT DATE BUT IT WAS SOMETIME AROUND MID-AUGUST OF LAST YEAR.

Q BASED ON YOUR EXPERIENCE AND WORKING OUT AT THE DEPARTMENT OF CORRECTIONS

AND BASED ON YOUR REVIEW OF THE RICHLAND COUNTY DETENTION CENTER RECORDS CONCERNING JONATHAN SIMMONS AND BASED ON YOUR MEETINGS WITH JONATHAN SIMMONS, DO YOU HAVE AN OPINION AS TO WHETHER OR NOT HE [Tr. 1880] WOULD BE ADAPTABLE TO PRISON LIFE?

A YES, AND LET ME EXPLAIN I DID MORE THAN MEET WITH JONATHAN. I ALSO OBSERVED JONATHAN IN A LIVING AREA WITH OTHER INMATES FOR A NUMBER OF MINUTES. I TALKED BRIEFLY TO ANOTHER INMATE ABOUT HIM. I TALKED TO CORRECTIONAL OFFICERS AND TO SUPERVISORS ABOUT HIM. I INTERVIEWED HIM REGARDING HIS FEELINGS, REGARDING HIS ABILITY TO GET BY IN PRISON AND IT WAS MY CONCLUSION THAT JONATHAN CAN AND WILL READILY ADAPT TO BEING IN PRISON SHOULD THAT BE THE SENTENCE THAT HE IS GIVEN.

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[Tr. 1893] THE WITNESS: MY NAME IS JAMES R. EVANS, E-V-A-N-S.

DIRECT EXAMINATION BY MR. BUNCH:

Q DR. EVANS, DO YOU LIVE IN COLUMBIA?

A I DO.

Q AND I REFER TO YOU AS DOCTOR, WHAT DO YOU DO?

A I TEACH AT THE UNIVERSITY IN THE DEPARTMENT OF THE PSYCHOLOGY AND I ALSO HAVE A PART-TIME PRIVATE PRACTICE.

[Tr. 1894] Q OKAY. SEE IF YOU COULD GET A LITTLE CLOSER TO THE MICROPHONE. I'M HAVING A LITTLE TROUBLE HEARING YOU.

A ALL RIGHT.

Q YOU HAVE A PART-TIME PRIVATE PRACTICE?

A YES, SIR.

Q WHAT DO YOU TEACH AT THE UNIVERSITY?

A ABNORMAL PSYCHOLOGY AND PSYCHOLOGY OF LEARNING DISABILITIES.

Q ALL RIGHT. AND WHAT IS YOUR PRACTICE IN? WHAT TYPE OF PRACTICE DO YOU HAVE?

A CLINICAL AND SCHOOL PSYCHOLOGY. IT'S A RATHER BROAD PRACTICE INCLUDING EVALUATION OF CHILDREN WITH LEARNING PROBLEMS, MENTAL RETARDATION, EVALUATION OF PSYCHOLOGICAL - GENERAL PSYCHOLOGICAL EVALUATIONS, PSYCHOTHERAPY, HYPNOTHERAPY, NEUROPSYCHOLOGY.

Q OKAY. DO YOU WORK WITH THE DEPARTMENT OF CORRECTIONS?

A YES, I DO.

Q DO YOU WORK WITH ANY OTHER STATE AGENCIES?

A I DO SOME TESTING FOR VOCATIONAL REHABILITATION.

Q DO YOU WORK FOR THE - WELL, TELL ME WHAT YOU DO WITH THE DEPARTMENT OF THE CORRECTIONS?

A I TEST INMATES FOR SUITABILITY FOR PAROLE AND SUITABILITY FOR PROMOTION TO DIFFERENT CUSTODY STATUS.

Q OKAY. TELL THE JURY WHAT YOUR EDUCATION IS, DR. [Tr. 1895] EVANS.

A I HAVE A P.H.D. IN PSYCHOLOGY AND - FROM THE BEGINNING, YOU MEAN?

Q WELL, WHEN DID YOU GRADUATE FROM COLLEGE?

A IN 1952.

Q AND WHEN DID YOU START YOUR - AT THAT TIME, WAS IT A PSYCHOLOGY EDUCATION OR DID YOU GET THAT LATER ON?

A NO, SIR, I WAS A TEACHER FOR AWHILE. I TAUGHT HIGH SCHOOL.

Q OKAY. AND THEN WHEN DID YOU GET INTO THE PSYCHOLOGICAL FIELD OF EDUCATION?

A 1960, 1961.

Q AND WHAT DEGREE DID YOU GET AT THAT TIME?

A MASTERS DEGREE IN SCHOOL PSYCHOLOGY.

Q AND HAVE YOU GOT OTHER PSYCHOLOGICAL DEGREES? YOU JUST MENTIONED YOU WERE A - HAD A DOCTORAL DEGREE. DO YOU HAVE -

A I HAVE A P.H.D. IN PSYCHOLOGY AND I HAVE DONE POST DOCTORAL WORK IN NEUROPSYCHOLOGY AT THE LANGLEY PORTER(SIC) NEUROPSYCHIATRIC INSTITUTE IN SAN FRANCISCO,

THE MEDICAL COLLEGE OF GEORGIA AND THE UNIVERSITY OF GEORGIA.

Q DO YOU HAVE A MASTERS DEGREE ALSO?

A YES, SIR.

Q TELL ME ABOUT YOUR – HOW LONG HAVE YOU HAD CLINICAL EXPERIENCE?

[Tr. 1896] A ABOUT THIRTY YEARS.

Q AND HOW ABOUT – DO YOU HAVE HOSPITAL PRIVILEGES?

A I HAVE HOSPITAL PRIVILEGES AT BAPTIST AND AT CHARTER RIVERS AND AT THE RHODES CENTER IN ORANGEBURG.

Q TELL THE JURY WHAT A HOSPITAL PRIVILEGE IS?

A IT ALLOWS YOU TO GO IN AND DO PSYCHOLOGICAL EVALUATIONS OR PSYCHOTHERAPY IN THE PSYCHIATRIC WARD.

Q ARE YOU A MEMBER OF ANY PROFESSIONAL ASSOCIATIONS?

A AMERICAN PSYCHOLOGICAL ASSOCIATION, THE NATIONAL ACADEMY OF NEUROPSYCHOLOGISTS, THE SOUTH CAROLINA ACADEMY – OR THE SOUTH CAROLINA ASSOCIATION OF PROFESSIONAL PSYCHOLOGISTS.

Q AND DO YOU HOLD ANY PROFESSIONAL CERTIFICATIONS?

A LICENSED IN CLINICAL AND SCHOOL PSYCHOLOGY.

Q YOUR HONOR, WE WOULD OFFER DR. EVANS AS AN EXPERT WITNESS IN THE AREA OF PSYCHOLOGY?

THE SOLICITOR: NO OBJECTION.

THE COURT: HE'S QUALIFIED. YOU MAY PROCEED.

MR. BUNCH: ALL RIGHT. DR. EVANS, AT OUR REQUEST, DID YOU EXAMINE JONATHAN SIMMONS?

A I DID.

Q WHAT DID YOUR EXAMINATION CONSISTS [sic] OF?

A I ADMINISTERED A BATTERY OF PSYCHOLOGICAL TESTS INCLUDING AN INTELLIGENCE TEST, AN ACHIEVEMENT TEST, SOME NEUROPSYCHOLOGICAL TYPE TESTS, RORSCHACH, A DISSOCIATION [Tr. 1897] QUESTIONNAIRE, ACHIEVEMENT TESTS.

Q OKAY. DID YOU REVIEW HIS SOCIAL HISTORY?

A I REVIEWED HIS SOCIAL HISTORY, YES, SIR.

Q ALL RIGHT. TELL THE JURY AT – SUMMARIZE FOR THE JURY WHAT YOUR – FIRST OF OVER ALL, LET ME ASK YOU THIS QUESTION. THE TESTS THAT YOU DID AND THE SOCIAL HISTORY THAT YOU DID, IS THIS THE TYPE OF TESTING AND INFORMATION WHICH AN EXPERT IN YOUR FIELD WOULD COMMONLY RELY UPON IN REACHING A DIAGNOSIS?

A YES, IT IS.

Q ALL RIGHT. TELL THE JURY IN A SUMMARY FASHION WHAT YOUR DIAGNOSIS WAS AND THEN WE'LL GO INTO THE REASONS FOR THAT DIAGNOSIS?

A I DIAGNOSED JONATHAN SIMMONS AS HAVING A NONSPECIFIC DISSOCIATIVE DISORDER.

Q ALL RIGHT. WHAT IS A NONSPECIFIC DISSOCIATIVE DISORDER?

A EACH OF US HAS THOUGHTS, FEELINGS, ENGAGE IN BEHAVIORS. WE FEEL THOSE ARE – THOSE BELONG TO US. WE FEEL THOSE ARE, IN THEIR TOTALITY ARE, MAKE UP ONE'S PERSONALITY OR ONE'S CONSCIOUSNESS. SOMETIMES – WELL, USUALLY THEY ARE INTEGRATED. WE FEEL THEY ARE – WE ARE A WHOLE UNIT. I AM WHO I AM. YOU ARE WHO YOU ARE. SOMETIMES IT WILL BE A DISINTEGRATION OF THAT. A DISSOCIATION IT'S CALLED IN WHICH SOME PARTS OF A [Tr. 1898] PERSONALITY MAY SPLIT OFF. SOME PARTS OF THE CONSCIOUSNESS MAY SEEM FOREIGN LIKE I'M NOT SURE I REALLY DID THAT. I'M NOT SURE I DID THAT BEHAVIOR OR DID SOMEBODY ELSE DO IT. I'M NOT SURE THAT WAS MY THOUGHT OR WAS IT SOMEBODY ELSE'S THOUGHT? DID I FEEL THAT WAY OR WHY DO I FEEL THIS WAY. IS SOMEONE MAKING ME FEEL THIS WAY. THESE SORTS OF WHO AM I QUESTIONS AND IN THE EXTREME, IT BECOMES WHAT'S KNOWN AS A MULTIPLE PERSONALITY WHERE YOU MAY HAVE SEVERAL DISTINCT PERSONALITIES THAT FUNCTION INDEPENDENTLY AND FLIP IN

AND OUT AS IN THE THREE FACES OF EVE. BUT IN A NON-DISSOCIATIVE – I MEAN, NONSPECIFIC DISSOCIATIVE DISORDER, THERE ARE VARIATIONS. THERE ARE DEGREES OF THAT IN WHICH ONE MAY HAVE OCCASIONAL PERIODS OF WONDERING WHO HE IS OR SHE IS BUT ALSO AMNESIA FOR CERTAIN MEMORIES. SOMETIMES ENGAGING IN BEHAVIORS AND SORT OF FEELING LIKE YOU ARE NOT DOING IT BUT STANDING ASIDE AND WATCHING SOMEONE DO IT AND EVEN MAY BE FEELING GREAT CONCERN ABOUT THE PERSON DOING IT BUT THINKING, WELL, IT'S NOT ME. IT CAN'T STOP IT. THAT'S A DISSOCIATIVE DISORDER.

Q IS THIS TYPE OF BEHAVIOR TRANSIENT? WHAT I MEAN BY THAT, DOES IT COME AND GO OR IS IT PRESENT AT ALL TIMES?

A THERE ARE – IT'S ON A WIDE CONTINUUM. THERE ARE SOME CASES WHERE IT'S TRANSIENT AND THERE ARE SOME CASES WHERE IT CAN HAPPEN REAL FAST. I MEAN, THEY MAY SUDDENLY GO INTO THIS STATE AND THEN BE OUT OF IT OR THEY MAY SLOWLY [Tr. 1899] GO IN AND COME OUT. IT MAY OCCUR JUST AT CERTAIN TIMES IN THEIR LIFE OR IT MAY OCCUR QUITE CHRONICALLY THROUGHOUT THEIR LIVES. AND THE MEMORIES, FOR EXAMPLE, MIGHT BE GONE NOW BUT THE NEXT DAY, THEY MIGHT COME BACK.

Q DR. EVANS, TELL THE JURY THE RATIONALE OR THE REASONS BEHIND YOUR CONCLUSION THAT JONATHAN SIMMONS HAD A NONSPECIFIC DISSOCIATED DISORDER?

A WELL, WHEN I FIRST WENT IN TO EVALUATE JONATHAN, IT WAS FOR A NEUROPSYCHOLOGICAL EVALUATION PRIMARY BECAUSE HE HAD HAD THIS WOUND AND THEY THOUGHT IT MAYBE WAS CAUSING HIM SOME BRAIN DAMAGE. AND AT FIRST, HE BEGAN BEHAVING IN A VERY PECULIAR FASHION. IT LOOKED LIKE HE WAS JUST MALINGERING. I MEAN, HE WAS – FOR EXAMPLE, I'D SAY, WHAT ARE THE COLORS IN THE AMERICAN FLAG AND HE'D SAY RED, WHITE AND ORANGE AS IF HE WERE JUST MALINGERING AND I THOUGHT, WELL, THAT'S WHAT THIS IS. AND THEN LONG ABOUT AN HOUR INTO –

Q MALINGERING – WHAT DO YOU MEAN BY MALINGERING?

A BY MALINGERING, FAKING. WANTING TO FAKE BAD. WANTING ME TO THINK THAT HE DIDN'T KNOW ANYTHING, HE WAS RETARDED AND CRAZY AND ALL. TO USE THE WORDS HE MIGHT USE IN THAT REGARD.

AFTER ABOUT AN HOUR INTO THE EVALUATION, I ASKED HIM A QUESTION AND HE SAID WELL, MAYBE, I THINK, IT WAS MICHAEL COULD ANSWER THAT ONE. AND I SAID MICHAEL? HE [Tr. 1900] SAID YES, MICHAEL. AND I SAID WELL, WHO IS MICHAEL AND HE SAID A FRIEND OF MINE. I CAN GET HIM TO ANSWER FOR ME. AND I SAID, DO YOU HAVE OTHER FRIENDS AND HE SAID YES. AND THEN HE PROCEEDED TO NAME A BUNCH OF THEM AND TELL ME THE DATES THEY WERE BORN. IT WAS DAMON AND PHILLIP, THE PHILOSOPHER AND

OTHER – TWO OR THREE OTHERS THAT HE NAMED. AND I SAID HOW LONG HAVE THESE PEOPLE BEEN AROUND AND HE SAID OH, A LONG TIME. AND HE SAID I GO BY MANY NAMES. SO THEN I WAS BEGINNING TO THINK, WELL, OKAY, EITHER HE'S SMARTER THAN THE PREVIOUS INTELLIGENCE TESTS HAD SHOWN AND HE'S REALLY STILL FAKING BAD AND NOW HE WANTS ME TO THINK HE'S A MULTIPLE PERSONALITY OR HE REALLY DOES HAVE SOME TYPE OF DISSOCIATED DISORDER. SO, I THEN PROCEEDED WITH THE INTERVIEW WONDERING IN MY MIND WHAT'S GOING ON HERE OR IS HE PSYCHOTIC, IS HE SCHIZOPHRENIC. I'M NOT SURE YET WHAT'S GOING ON BUT I HAVE THESE DIFFERENT POSSIBILITIES AND THEN I STARTED QUESTIONING HIM ABOUT SEXUAL ABUSE BECAUSE I HEARD THAT THERE WAS A RUMOR OF SEXUAL ABUSE. AND HE SAID JONATHAN WAS MOLESTED BY HIS GRANDMA. AND I SAID WERE YOU MOLESTED BY YOUR GRANDMOTHER? HE SAID JONATHAN WAS MOLESTED BY HIS GRANDMA AS IF HE WERE IN THE THIRD PERSON, AS IF HE COULD NOT ACTUALLY, IN FACT, ADMIT THAT IT HAD HAPPENED TO HIM AND AS IF HE WERE TALKING THROUGH A THIRD PERSON. I STILL WASN'T SURE OF WHAT WAS GOING ON AND I REQUESTED TO COME BACK A WEEK LATER.

[Tr. 1901] Q DR. EVANS –

A – A MONTH LATER –

Q – SO, ONE OF YOUR REASONS AT REACHING THIS CONCLUSION WOULD HAVE BEEN HIS RELATING TO YOU THESE DIFFERENT PEOPLE?

A YES.

Q OR –

A YES, THIS IS –

Q – AND TALKING IN THE THIRD PERSON?

A YES, SIR, THIS IS LIKE HE WAS STANDING ASIDE AND WATCHING A THIRD PERSON. IT HAD HAPPENED TO A THIRD PERSON. LIKE HE HAD ADOPTED OTHER PERSONS. OTHER PERSONALITIES. NOT A NICE NEAT MULTIPLE PERSONALITY TYPE THING, BUT SOME ASPECTS OF THAT, OF DISSOCIATIVE DISORDER. PERHAPS LIKE HIS SISTER HAD DESCRIBED WITH HER IMAGINARY PLAYMATE ONLY I GOT THE IDEA HE MAY HAVE TAKEN IT MUCH FURTHER AND HAD GONE OUT OF TOUCH WITH REALITY WITH IT AND MAYBE COULDN'T VOLUNTARILY SAY, OKAY, I DON'T WANT TO, NO LONGER WANT TO BE SHAZAM OR WHATEVER. MAYBE HE, IN FACT, GOT STUCK IN THOSE ROLES.

Q TELL THE JURY WHAT OTHER REASONS YOU USED OR RELIED UPON IN MAKING YOUR EVALUATION?

A YES. AFTER I ARRANGED THEN TO COME BACK AND REEVALUATE HIM AND I RETURNED IN ABOUT A MONTH AND JONATHAN SAID – I SAID, DO YOU REMEMBER ME AND HE SAID YEAH, I [Tr. 1902] THINK, I SAW YOU SOMEWHERE. AND I SAID, WHERE. WELL, PROBABLY IN A HOSPITAL. I THOUGHT WELL, MAYBE THIS IS JUST STILL MALINGERING, FAKING BAD. I DIDN'T KNOW WHY HE

WOULD SAY THAT. PLUS, I MIGHT ADD AND PARENTHETICALLY RIGHT NOW AS AN ASIDE, THERE WERE OTHER THINGS BY THIS POINT HAD LED ME TO THINK THAT HE WAS NOT JUST FAKING BAD COMPLETELY.

I SAID, WELL, DAMON – I MEAN, JONATHAN, DO YOU REMEMBER LAST WEEK YOU TALKED ABOUT DAMON AND THESE OTHER PEOPLE THAT YOU SAID THAT YOU WERE AND I DO A LOT OF HYPNOSIS AND I'VE DONE MANY TIMES WHERE I'VE GIVEN PEOPLE POST-HYPNOTIC SUGGESTIONS AND THEN WATCHED THEM ENGAGE IN AN ACTIVITY AND SAID WHY ARE YOU DOING THAT AND THEY HAVE A VERY PERPLEXED LOOK ON THEIR FACE AND I RECOGNIZED THAT. IN MY OPINION, THAT WAS THE SAME TYPE LOOK THAT JONATHAN GAVE ME, DAMON, MICHAEL. NO RECOLLECTION. AND I THOUGHT, WELL, IF HE, IN FACT, WAS IN A DISSOCIATED STATE THE FIRST TIME I SAW HIM, THEN MAYBE HE REALLY DOESN'T REMEMBER A THING ABOUT THAT. MAYBE HE CAN ONLY GET IN TOUCH WITH THESE MEMORIES IN A CERTAIN STATE. AND SO, I THEN DECIDED THAT SINCE I HAD SUSPECTED THE POSSIBILITY OF THIS, OF DISSOCIATION, I HAD BROUGHT ALONG A DISSOCIATION SCALE, BURNSTEIN AND PULLMAN (PHONETIC) DISSOCIATION SCALE IN WHICH THEY HAVE 28 AREAS AND YOU ASK THE PERSON HAVE THESE THINGS EVER HAPPENED TO YOU AND, IF SO, WHAT PERCENTAGE OF THE TIME WOULD YOU SAY THEY HAVE HAPPENED? AND OF 28 OF THESE [Tr. 1903] BEHAVIORS WHICH ARE KNOWN TO BE VERY FREQUENT BEHAVIORS

AMONG PERSONS WHO ARE DISSOCIATED INCLUDING MULTIPLE PERSONALITIES, HE RESPONDED THAT THEY OCCURRED AT LEAST 50 PERCENT OF THE TIME ON TWENTY OF THEM. NOW, I THOUGHT, WELL, MAYBE, ONCE AGAIN, WHY DID HE NOT DO IT ON ALL 28 IF HE WAS REALLY JUST FAKING BAD. WHY DID HE LEAVE OFF EIGHT OF THEM? WHY DID HE NOT SAY IT OCCURRED ON ALL OF THEM. AND THEN I ADDED UP HIS SCORE AND IT WAS MOST LIKE PERSONS WITH MULTIPLE PERSONALITY. IT WAS A HIGHER SCORE THAN SCHIZOPHRENICS OBTAIN ON THAT SCALE. IT WAS A HIGHER SCORE THAN TEEN-AGERS OBTAIN ON THAT SCALE AND TEEN-AGERS OFTEN REPORT DISSOCIATION NOW AND THEN. IT'S SORT OF NORMAL AMONG SOME TEEN-AGERS AND FAR HIGHER THAN NORMAL PERSONS.

SO, I WAS EVEN MORE CONVINCED NOW THAT SOME DISSOCIATED DISORDER WAS IN ACTION WITH THIS MAN.

Q SO, YOU ACTUALLY GAVE HIM A TEST THEN TO MEASURE DISSOCIATION OR TO DETERMINE WHETHER YOU THOUGHT HE DID HAVE DISSOCIATION?

A IT'S ONE OF THE ONLY VALIDATED DISSOCIATION SCALES AVAILABLE.

Q OKAY. DID YOU ALSO GIVE ANY SORT OF TESTS OR QUESTIONNAIRES TO ANYBODY ELSE?

A YES, SIR. AT THAT POINT, I DECIDED WELL, LET'S SEE IF HIS FAMILY MEMBERS OR PEOPLE WHO

HAVE KNOWN HIM WELL OBSERVED ANY OF THESE BEHAVIORS. SO, I CONSTRUCTED A SCALE [Tr. 1904] OF, I BELIEVE, IT WAS TWENTY ITEMS AND OF THE TWENTY ITEMS, I INTERSPERSED THEM. LIKE ODD NUMBERS WOULD BE ONES THAT MIGHT NOT BE RELATED TO DISSOCIATION, BUT THEY WOULDN'T BE GOOD TO SAY THAT YOU DID THEM AND THE EVEN NUMBERS HAD TO DO WITH DISSOCIATION AND I GAVE ONE TO HIS MOTHER AND ONE TO HIS SISTER, ROBIN.

NOW, WHEN THEY CAME BACK, ALTHOUGH THEY HAD RATED HIM AS ENGAGING IN A LOT OF THESE BEHAVIORS, THE PREDOMINANCE WAS TOWARD THE EVEN NUMBERS, THE ONES THAT HAD TO DO WITH DISSOCIATION LIKE SITTING AND STARING INTO SPACE, SEEMING TO ACT AS IF HE WAS SOMEBODY ELSE, TELLING WHAT THEY KNEW WERE LIES BUT IN A WAY THAT IT SEEMED TO THEM THAT HE THOUGHT HE REALLY WAS TELLING THE TRUTH. THEY ENDORSED THESE AS OCCURRING VERY OFTEN. ONE OR THE OTHER ENDORSED EACH OF THOSE AS OCCURRING VERY OFTEN AND THE OTHER ONE AS VERY – AS FREQUENTLY, NOT – NOT EXTREMELY OFTEN, BUT FREQUENTLY. AND THEY ENDORSED THAT MORE THAN MOST – THOSE TYPE ITEMS MORE THAN MOST ARE THE ITEMS THAT HAD TO DO WITH OTHER UNDESIRABLE BEHAVIORS BUT NOT RELATED TO DISSOCIATION.

Q OKAY. YOU'VE MENTIONED ALSO THAT WHEN YOU WENT BACK FROM THE FIRST VISIT

THAT HE COULDN'T RECALL THE PEOPLE HE MENTIONED MIKE AND PHILLIP AND THAT SORT OF THING –

A YES, SIR –

Q – WOULD THAT HAVE BEEN A REASON THAT YOU USED TO [Tr. 1905] DRAW YOUR CONCLUSION?

A YES, SIR, BECAUSE I FELT HE WAS IN A DIFFERENT STATE. THEN WENT [sic] I WENT BACK THE THIRD TIME TO – JUST TO GET A GENERAL IDEA OF HIS – WHETHER HE WAS RATIONAL OR NOT THAT SO A PARALEGAL COULD ADMINISTER THE M. M. P. I. TO HIM, READ THE M. M. P. I. QUESTIONS TO HIM. HE, AGAIN, SAID HE HAD NO RECOLLECTION OF DAMON OR ANY OF THESE PEOPLE. AND ONCE AGAIN, GAVE ME THAT LOOK OF WHAT ARE YOU TALKING ABOUT.

Q ALL RIGHT. LET ME ASK YOU, YOU MENTIONED THE M. M. P. I. ARE YOU FAMILIAR WITH HIM TAKING – OR TELL ME WHAT AN M. M. P. I. IS, FIRST?

A AN M. M.P.I. IS A MINNESOTA MULTI-PHASIC PERSONALITY INVENTORY. IT'S THE MOST POPULAR, THE MOST COMMONLY GIVEN TEST OF PERSONALITY AND IT REQUIRES YOU TO ANSWER 584 QUESTIONS IN A YES OR NO FASHION AND AS A RESULT OF YOUR ANSWERS, YOU CAN BE RATED AS TO WHETHER YOU SCORE LIKE PEOPLE DIAGNOSED AS SCHIZOPHRENIC OR DEPRESSED OR SOCIOPATHIC AND DIFFERENT TYPES OF PSYCHIATRIC CATEGORIES. AND HE HAD BEEN ADMINISTERED

THIS TEST AT HALL, I BELIEVE – AT THE STATE HOSPITAL –

Q ALL RIGHT. WHERE IS HALL?

A HALL PSYCHIATRIC INSTITUTE OR THE STATE HOSPITAL, I'M NOT –

Q THE STATE HOSPITAL.

[Tr. 1906] A THE STATE HOSPITAL AND –

Q WHEN HAD THAT TEST BEEN GIVEN, DO YOU REMEMBER?

A I DON'T REMEMBER WHEN IT WAS GIVEN.

Q OKAY.

A BUT THEY HAD FELT THAT IT WAS – HE WAS JUST ALL OVER THE PLACE WITH IT AND THAT HE HADN'T REALLY TRIED AND HE HAD BEEN ELEVATED – WHAT WE CALL ELEVATED ON SEVERAL AREAS, MEANING THAT HE HAD SCORED ABNORMALLY IN FIVE OR SIX AREAS. LIKE DEPRESSION AND A BUNCH OF THE AREAS THAT DON'T REALLY MEAN NECESSARILY BECAUSE HE'S HIGH ON DEPRESSION, THAT HE IS DEPRESSED BUT IT'S IN THE DIRECTION OF DEPRESSION. HE HAD SCORED HIGH ON SEVERAL OF THEM. THIS CAUSED THEM TO FEEL THAT IT PROBABLY WAS INVALID.

WHEN IT WAS RE-ADMINISTERED BY THE PARALEGAL, HE DID THE SAME THING. HE SCORED HIGH ON MOST ALL THE SAME ONES THAT HE HAD SCORED HIGH ON BEFORE. AND WE HAD A COMPUTER SCORE AND THE ONE INTERPRETATION WAS

FAKING BAD. THAT HE WAS PERHAPS MALINGERING AGAIN. THAT HE JUST WANTED US TO THINK HE WAS BAD IN EVERYTHING AND HAD MANY PROBLEMS, BUT – YOU KNOW, THAT'S A POSSIBILITY BUT BY THAT POINT IN TIME, WHEN HE WAS DOING THE OTHER QUESTIONS, ANSWERING OTHER QUESTIONS FOR ME, HE NO LONGER APPEARED TO BE FAKING BAD, SO, I HAVE A REASON TO BELIEVE THAT HE DID, IN FACT, HONESTLY REPORT MANY, MANY SYMPTOMS OF DIFFERENT PSYCHIATRIC TYPE CATEGORIES AND THAT'S NOT UNUSUAL AMONG [Tr. 1907] PEOPLE WHO HAVE A DISSOCIATIVE DISORDER. AS A MATTER OF FACT, THAT'S COMMON AMONG PEOPLE WHO HAVE A DISSOCIATIVE DISORDER. THEY SOMETIMES – THEY'RE DEPRESSED OVER THEIR CONDITION. THEY SOMETIMES FEEL LIKE SOMEONE ELSE IS TALKING TO THEM AND THEY HEAR VOICES. IT MAY JUST BE ANOTHER ASPECT OF THEIR PERSONALITY TALKING TO THEM BUT THEY THINK IT'S AN OUTSIDE FORCE AND THAT SCORES YOU TOWARDS SCHIZOPHRENIA ON THE M. M. P. I. IT'S NOT UNUSUAL, IN OTHER WORDS, FOR YOU TO HAVE A LOT OF WHAT WE CALL ELEVATED SCALES OR HIGH SCORES ON THAT IF YOU HAVE A DISSOCIATION DISORDER. IT'S ALSO NOT UNUSUAL IF YOU'RE TRYING TO FAKE BAD, BUT I HAPPEN TO BELIEVE THAT IN HIS CASE, IT WAS PRIMARILY THE DISSOCIATIVE ORDER THAT WAS LEADING TO THAT.

Q DOCTOR, YOU'VE HAD A CHANCE TO REVIEW THE I.Q. TEST THAT HE HAD BEEN GIVEN IN THE PAST OR THE RESULTS OF THOSE TESTS. I

THINK, YOU ALSO GAVE HIM AN I.Q. TEST, TOO, DIDN'T YOU?

A YES, SIR, I DID.

Q DID THIS HAVE ANY BEARING ON YOUR DIAGNOSIS OR FACTOR INTO YOUR REASONS FOR DIAGNOSING JONATHAN SIMMONS AS HAVING A DISSOCIATIVE DISORDER?

A WELL, ONLY IN THE SENSE THAT, I THINK, I OBTAINED AN I.Q. IN THE 60'S AND HE'S HAD THEM IN THE 70'S AND HE'S HAD THEM AS HIGH AS 80 AND THAT'S A LITTLE WIDER VARIATION THAN [Tr. 1908] ONE WOULD EXPECT BY ERROR ALONE, BY ERROR OF THE TEST AND IT WOULD BE COMMENSURATE WITH SOMEONE WHO WAS IN DIFFERENT STATES OF MIND WHEN THEY WERE TAKING THE TEST.

Q LET ME ASK YOU, WHERE DID HE SCORE IN YOUR OPINION AND – HOW HAVE YOU GIVEN I.Q. TESTS IN THE PAST?

A YES, SIR.

Q HOW MANY I.Q. TESTS HAVE YOU GIVEN WOULD YOU ESTIMATE?

A TWO THOUSAND.

Q OKAY. AND WHERE – BASED ON YOUR GIVING THE I.Q. TEST AND YOUR REVIEW OF JONATHAN SIMMONS, HOW WOULD YOU RATE HIS INTELLIGENCE?

A I BELIEVE, AT THE PRESENT HE'S FUNCTIONING IN THAT BORDERLINE CATEGORY.

Q WHAT DO YOU MEAN BORDERLINE?

A IN THE – THEY CALL IT BORDERLINE BECAUSE IT'S BORDERLINE BETWEEN RETARDATION AND NORMALCY. ANYTHING ABOVE 80 IS CONSIDERED WITHIN THE SLOW NORMAL AND AS YOU GET CLOSER TO ONE HUNDRED, IT'S COMPLETELY AVERAGE. BELOW 70 IS GENERALLY CONSIDERED MENTAL RETARDATION. AND, SO, THEY JUST HAVE THE 70'S AS CALLING A BORDERLINE. IT'S HARD TO SAY, YOU KNOW, IT'S LIKE IS THE CUP HALF FULL OR HALF EMPTY? IS HE NEARLY NORMAL OR IS HE NEARLY RETARDED. BORDERLINE.

Q DOCTOR, IN YOUR PROFESSIONAL OPINION, SOMEBODY WHO [Tr. 1909] SCORES IN THAT RANGE ON AN I.Q. TEST, COULD THEY ACTUALLY FAKE THE RESULTS OF A MENTAL DISORDER?

A THEY COULD ATTEMPT TO FAKE IT AND, I THINK, HE WAS ATTEMPTING TO FAKE IT WHEN HE WAS AT THE STATE HOSPITAL AND PERHAPS WHEN HE FIRST – WHEN I FIRST SAW HIM. AND THE THINGS THAT HE WOULD ATTEMPT TO FAKE WERE CORRECT, TRANSPARENT, LIKE RED, WHITE AND ORANGE. AND IT WAS LIKE HE KNEW WHAT IT WAS BUT HE DIDN'T WANT ME TO THINK HE KNEW IT. BUT WHEN YOU GET DOWN TO SOME OTHER ASPECTS OF IT, NO. FOR EXAMPLE, LATER THAT DAY, I GAVE HIM THE ONE CALLED THE TRAIL MAKING TEST AND THIS REQUIRES YOU TO BASICALLY INTERCONNECT DOTS. YOU'D GO FROM ONE TO TWO TO THREE TO FOUR AND THEN ON THE SECOND ONE, YOU'D GO ONE TO "A", TWO TO "B",

THREE TO "C", FOUR TO "D". IT WAS LIKE CONNECT THE DOTS OR CONNECT THE CIRCLES. AND HE DID VERY WELL ON THE FIRST ONE AND THEN HE COULDN'T DO THE SECOND ONE AT ALL. AND THAT – I DON'T THINK HE WOULD HAVE BEEN SMART ENOUGH IN THAT SENSE TO FAKE AND SAY, WELL, I'M GOING TO REALLY THROW THIS GUY OFF AND I'M GOING TO DO THE FIRST ONE BECAUSE IT'S EASY AND HE'LL – I'LL JUST FAIL THE SECOND ONE AND HE'LL THINK I'M BRAIN DAMAGED AND I DON'T THINK HE COULD.

Q WHAT ABOUT HIS SOCIAL HISTORY, HIS BACKGROUND, WOULD THAT BE COMMENSURATE WITH SOMEBODY HAVING A DISSOCIATIVE DISORDER?

[Tr. 1910] A OH, YES.

Q. TELL ME WHAT FACTORS YOU WOULD CONSIDER TO BE CONSISTENT WITH A DISSOCIATE DISORDERS?

A MOST PEOPLE TODAY THINK OF – WHEN THEY THINK OF A DISSOCIATIVE DISORDER, THEY ARE THINKING OF MULTIPLE PERSONALITY WHICH IS THE EXTREME CASE OF IT. BUT THERE ARE OTHER TYPES OF DISSOCIATIVE DISORDER. AND JONATHAN HAD SORT OF A MIXTURE. THAT'S WHY I CALLED IT NONSPECIFIC. BUT IN ALL CASES, THE MOST ACCEPTED THEORY AS TO WHY THESE DEVELOPED IS THAT THEY ARE NECESSARY TO ESCAPE PSYCHOLOGICALLY AND OR PHYSICALLY TOO PAINFUL A LIFE. SOME SITUATION IN YOUR LIFE AND ONE OF THE MOST COMMON ONES IS

PHYSICAL ABUSE. SEVERE PHYSICAL ABUSE. THE BEATINGS. SEVERE BEATINGS. ONE CAN GET INTO A DISSOCIATIVE STATE WHERE THEY MIGHT NOT EVEN FEEL THE PAIN ANYMORE OF THE BEATINGS AND THEN, A SECOND ONE THAT IS IMPLICATED IN A GREAT MANY CASES, A FEMALE MULTIPLE PERSONALITY IS SEXUAL ABUSE WHERE THEY CAN ACTUALLY – TO ESCAPE THE PSYCHOLOGICAL PAIN OF THIS – WHAT'S HAPPENING TO THEM GO INTO A – IT'S LIKE THEY LEARN TO GO INTO A TRANCE AND THAT TRANCE IS A DISSOCIATED STATE WHERE THEY CAN LATER PERHAPS NOT REMEMBER OR JUST REMEMBER VAGUELY WHERE THEY CAN ACTUALLY, SOME OF THEM REPORT THEY HAVE ACTUALLY FELT THEY FLOATED OUT OF THEIR BODY AND WATCHED SOMEONE ELSE BEING SEXUALLY ABUSED. AND SO, THE EVENTS REPORTED EARLIER, SOME [Tr. 1911] OF THEM WITH STRONG SUPPORT, SOME OF THEM ALLEGED, CERTAINLY WOULD BE OF THE TYPE WHICH WOULD LEAD ONE TO HAVE A DISSOCIATIVE DISORDER. I MEAN, THAT'S ONE LIKELY OUTCOME. IF YOU'RE GIVEN THE DISSOCIATIVE DISORDER FIRST, THEN THE ODDS ARE VERY GREAT THAT ONE OF THOSE THINGS OCCURRED IN THEIR BACKGROUND.

Q LET ME ASK YOU IF YOU PERFORMED WHAT'S CALLED A RORSCHACH TEST?

A YES, I DID.

Q TELL THE JURY WHAT A RORSCHACH TEST IS.

A A RORSCHACH TEST IS – YOU KNOW IS THE INK-BLOT TEST. I MEAN, EVERYONE HAS SEEN THE INK-BLOT TEST AND YOU LOOK AT THESE BLOTS OF INK WHICH REALLY ARE NOTHING BUT BLOTS OF INK. IT'S LIKE LOOKING AT THE CLOUDS. THEY'RE REALLY JUST CLOUDS. BUT YOU ALL HAVE DONE THIS WHERE YOU WOULD SAY, WELL, GEE, I SEE A RABBIT UP THERE OR A RHINOCEROS OR SOMETHING AND THE IDEA IS THAT IF IT'S JUST A CLOUD OR JUST AN INK BLOT, THEN WHAT YOU SEE MUST BE A PROJECTION FOR YOUR PERSONALITY. YOU MUST HAVE PROJECTED PART OF YOUR PERSONALTIY OUT INTO IT. SO, IT'S CALLED PROJECTIVE TECHNIQUE.

NOW, IN LOOKING AT THESE INK BLOTS, JONATHAN GAVE SOME VERY BIZARRE RESPONSES MANY OF WHICH DID NOT LOOK ANYTHING LIKE THE BLOT. FOR EXAMPLE, ANGEL OF DEATH. THIS DIDN'T – YOU'RE NOT GOING TO SEE ANGEL OF DEATH ON [Tr. 1912] THERE, NOBODY KNOWS WHAT AN ANGEL OF DEATH LOOKS LIKE. BUT THIS IS – INDICATES TO ME THAT HE WAS PREOCCUPIED WITH SUCH THEMES. I COULD READ A FEW OF THOSE IF IT'S PERMISSIBLE.

Q GO AHEAD.

A ANGEL OF DARKNESS, SPIRIT OF PAIN AND CRUELTY, SHIELD OF TERROR, EVIL BAT, DEMON, VIPER WITH TEETH, DEMONIC FORM –

Q DR. EVANS, WHAT – LET ME ASK YOU THIS BEFORE WE GO INTO THAT. TELL ME HOW YOU

EVALUATED THESE RESPONSES WITH JONATHAN SIMMONS.

A FIRST OF ALL, THEY WERE A GROSS DISTORTION OF REALITY BECAUSE AS I SAID, THOSE BLOTS, YOU KNOW, MOST PEOPLE SEE RABBITS AND BATS AND NOT DEMONIC BATS AND BUTTERFLIES AND THIS SORT OF THING IN THE PEOPLE. SO, HE WAS GROSSLY DISTORTING. IT.

I – TO ME, I INTERPRETED IT AS HE'S PREOCCUPIED WITH FORCES OF EVIL, FEAR OF FORCES IN HIS ENVIRONMENT, FEAR OF EVIL FORCES IN HIS ENVIRONMENT. THERE WERE – THERE WAS ONE CARD WHICH COMMONLY ELICITS THEMES OF WOMEN OF FEMININITY, MOTHER FIGURES. WOMEN IN GENERAL. WE KNOW THAT BECAUSE COLLEGE STUDENTS HAVE TAKEN IT AND THE NUMBER OF RESPONSES THAT ARE LITTLE GIRLS HERE OR WOMEN WITH PONYTAILS OR WHATEVER. THESE ARE VERY COMMON TYPE RESPONSES.

[Tr. 1913] JONATHAN'S RESPONSE THE FIRST TIME – BY THE WAY, I GAVE SOME OF THESE TESTS TWICE AS A DOUBLE CHECK ON IT. THE FIRST TIME HE SAID LOOKS NICE BUT TRANSFORMS ITSELF INTO A FOUR-LEGGED BEAST. AND THE SECOND TIME ON THAT CARD HE SAID A VIPER WITH TEETH AND FANGS IS EVIL, VERY EVIL.

IN MY OPINION, THAT'S COMMENSURATE WITH STATEMENTS THAT WE HEARD EARLIER THAT HIS – SOMEONE IN HIS FAMILY, WE HEARD EARLIER THE GRANDMOTHER HAD ABUSED HIM AND THREATEN

[sic] DIRE CONSEQUENCES, EVIL CONSEQUENCES, SHOULD HE TELL.

Q HOW MANY OF THESE TESTS WOULD YOU ESTIMATE YOU HAVE PERFORMED?

A AROUND THREE THOUSAND.

Q HOW LONG HAVE YOU BEEN GIVING THEM?

A SINCE 1962.

Q DO YOU FIND THEM TO BE RELIABLE OR LET ME ASK YOU, INSTEAD OF YOU YOURSELF PERSONALLY, ARE THEY CONSIDERED IN YOUR PROFESSION TO BE RELIABLE?

A THEY ARE CONSIDERED BY MANY PSYCHOLOGISTS TO BE RELIABLE AND, I THINK, THE BEST EVIDENCE FOR THAT IS THEY WITHSTOOD THE TEST OF TIME. THEY ARE STILL VERY FREQUENTLY USED DESPITE THE FACT THEY'VE BEEN AROUND SINCE THE 1920'S AND HAVE BEEN SEVERELY CRITICIZED MANY TIMES. SO, NO – NOT EVERYONE AGREES THAT THEY ARE RELIABLE. I DO.

[Tr. 1914] Q DID YOU HAVE A CHANCE TO REVIEW JONATHAN SIMMONS' JOB HISTORY?

A YES, I DID.

Q AND WHAT DID THAT REFLECT?

A THAT HE WAS VERY ERRATIC IN HIS JOB PERFORMANCES.

Q ALL RIGHT. AND YOU'VE HEARD TESTIMONY TODAY AND HAVE YOU HAD A CHANCE TO

REVIEW ALSO HIS LACK OF MEMORY FOR CERTAIN EVENTS?

A YES, SIR. THAT WAS PART OF THAT QUESTIONNAIRE THAT THE MOTHER AND THE SISTER BOTH AGREED THAT HE HAD MANY LAPSES OF MEMORY. HE TOLD ME HE HAD LAPSES OF MEMORY. HE TOLD – APPARENTLY, I – AS I RECALL, HE TOLD PEOPLE IN THE PRISON THAT HE HAD HAD LAPSES OF MEMORY. FOR EXAMPLE, HE TOLD ME HE HAD NO MEMORY WHATSOEVER OF TRYING TO HANG HIMSELF OR OF TRYING TO SET HIMSELF ON FIRE OR ACTUALLY SETTING HIMSELF ON FIRE, I BELIEVE.

Q OKAY. AND WOULD THAT BE – LEND CIRCUMSTANTIAL SUPPORT FOR YOU CONCLUSION THAT HE HAS A DISSOCIATIVE DISORDER?

A YES, SIR, IT WOULD.

Q WHAT WOULD THE EFFECT OF ALCOHOL OR DRUGS BE UPON SOMEONE WHO HAD A DISSOCIATIVE DISORDER?

A IT IS NOW WIDELY AGREED THAT DRUGS AND ALCOHOL CAN FACILITATE A DISSOCIATIVE STATE. THAT WHEN YOU INGEST IT, YOU ARE MORE APT TO – THAT'S LIKELY TO KICK OFF ONE OF [Tr. 1915] THESE DISSOCIATE STATES.

Q DOCTOR, YOU HAVE MENTIONED MALINGERING AND YOU SAID YOU THOUGHT JONATHAN SIMMONS WAS MALINGERING SOME, IS THAT CORRECT?

A I THINK HE WAS THE FIRST TIME I SAW HIM, ESPECIALLY.

Q IS IT POSSIBLE FOR SOMEONE TO BE MALINGERING AND ALSO HAVE A MENTAL ILLNESS AT THE SAME TIME?

A YES, SIR, IT CERTAINLY WOULD BE. I THINK I HAVE MENTIONED THIS DIFFERENT TIMES THAT WE ARE ALL FAMILIAR WITH THE – WELL, I GUESS THE MOST COMMON ONE IS A CHILD WHO MIGHT HAVE A TEMPERATURE OF 103 BUT PUTS THE THERMOMETER NEAR THE OVEN SO THAT IT LOOKS LIKE IT'S 108 AND HE'LL GET OUT OF SCHOOL.

Q DR. EVANS, SUMMARIZE IF YOU WOULD FOR THE JURY WHAT THE CAUSES ARE OF A DISSOCIATIVE DISORDER?

A ONE OF THE MOST FREQUENTLY ACCEPTED CAUSES, THE VAST MAJORITY OF DISSOCIATIVE DISORDERS OF THE SEVERE TYPE OF LIKE MULTIPLE PERSONALITY AND THE OTHERS AS WELL, I BELIEVE, TO BE CAUSED BY EXTREME PHYSICAL OR SEXUAL ABUSE DURING CHILDHOOD WHICH IS TOO PAINFUL FOR THE MIND TO ACCEPT, WHICH FACILITATES THE PERSON DEVELOPING A HABITUAL MODE OF DEFENSE OF GOING INTO A SORT OF A TRANCE, HYPNOTIC-LIKE TRANCE, SELF-HYPNOSIS-LIKE TRANCE AND AS A RESULT OF BEING ABLE TO THINK IT'S HAPPENING TO SOMEBODY ELSE, FORGET PARTS OF IT OR IN OTHER WORDS, DISSOCIATE AND [Tr. 1916] NOT HAVE THAT UNITY OR THAT INTEGRATION THAT MOST OF US HAVE WHERE WE RECOGNIZE WHICH IS WHAT'S REALLY

OUR THOUGHTS OR OUR BEHAVIORS, NOW WHERE DID IT COME FROM SORT OF THING.

Q HOW DOES THE NONSPECIFIC DISSOCIATIVE DISORDER AFFECT JONATHAN SIMMONS?

A IN MY IN [sic] OPINION –

Q IN YOUR OPINION.

A – IN MY OPINION –

Q BASED ON YOUR THIRTY YEARS IN PSYCHOLOGY AND YOUR REVIEW OF THE RECORDS IN THIS CASE, TELL ME YOUR OPINION.

A IN MY OPINION, JONATHAN WAS SEVERELY PHYSICALLY ABUSED AND BASED ON THESE RORSCHACH RESULTS AND THE OTHER TESTIMONY WE HAVE HEARD TODAY AND THAT I HAVE HEARD SOME EARLIER, I BELIEVE, ALSO SEXUALLY ABUSED AND THIS WAS SO EXTREME THAT HE LEARNED TO DISSOCIATE AND THAT HE IN THESE DISSOCIATIVE STATES, HE MIGHT ENGAGE IN BEHAVIORS WHICH DIDN'T SEEM TO HIM THAT HE WAS DOING AND THEN HE MIGHT HAVE AMNESIA FOR THEM AFTERWARDS AND IT WOULD SEEM VERY LOGICAL THAT IF HE HAD BEEN PHYSICALLY ABUSED BY HIS FATHER, THAT IT WOULD BE ALMOST IMPOSSIBLE TO ESCAPE FEELINGS OF EXTREME HATRED AND ANGER TOWARD YOUR FATHER AND WANTING TO DESTROY SOME OF THE THINGS YOUR FATHER HELD AND VALUED LIKE HIS CAMPER AND SO ON. AND THAT HE WOULD ALSO COME TO HATE WOMEN, PERHAPS ESPECIALLY OLDER WOMEN. AND IF THIS WAS SOMETHING THAT HE WOULD

NOT REGULARLY, ORDINARILY DO BUT [Tr. 1917] FLIPPED INTO A DISSOCIATIVE STATE IN WHICH IT DIDN'T SEEM LIKE HE WAS REALLY DOING IT, IN WHICH HE COULD HAVE AMNESIA FOR AFTERWARD, IT WOULDN'T SURPRISE ME AND IT IS MY OPINION, THAT'S THE SORT OF STATE HE WAS IN WHEN HE SMASHED HIS FATHER'S CAMPER, KILLED THE FATHER'S TURTLE AND RAPED AND ALLEGEDLY, I GUESS I HAVE TO USE THE WORD ALLEGEDLY OR I'M NOT SURE, BUT WHATEVER WITH THESE WOMEN.

Q BEG THE COURT'S INDULGENCE ONE MOMENT, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. BUNCH: JUST A COUPLE MORE QUESTIONS, DR. EVANS. IN YOUR PROFESSIONAL OPINION, IS IT LIKELY THAT WHEN THE MURDER OF JOSIE LAMB WAS COMMITTED IN THIS CASE THAT JONATHAN SIMMONS WAS ACTING UNDER THE INFLUENCE OF A MENTAL OR EMOTIONAL DISTURBANCE?

A YES, IT'S MY OPINION THAT THAT'S LIKELY.

Q ALL RIGHT. AND IS IT YOUR – WOULD IT BE YOUR PROFESSIONAL OPINION OR DO YOU HAVE A PROFESSIONAL OPINION ON WHETHER THE CAPACITY OF JONATHAN SIMMONS TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED?

A YES, I AGREE WITH THAT, IF HE WAS IN A DISSOCIATIVE STATE, HE CERTAINLY WOULD NOT – MANY PEOPLE IN DISSOCIATIVE STATES WILL REPORT LIKE WITH THE MULTIPLES, THEY WILL REPORT LATER THAT PERSONALITY "A" WAS ENGAGING IN THIS BEHAVIOR AND I WAS WATCHING IT AND COULDN'T DO [Tr. 1918] ANYTHING TO STOP IT MUCH TO THEIR CHAGRIN AND, I THINK, THAT IT'S ENTIRELY POSSIBLE THAT THIS WAS HAPPENING WITH JONATHAN EVEN THOUGH I DON'T BELIEVE HE WAS IN A FULL BLOWN MULTIPLE.

Q OKAY. AND IS IT YOUR TESTIMONY THAT JONATHAN SIMMONS' REASONING IS IMPAIRED?

A YES, IT IS IN DISSOCIATIVE STATES AND IN GENERAL BECAUSE OF HIS LIMITED INTELLIGENCE.

Q OKAY. YOU ALSO PERFORMED SOME TESTS CONCERNING HIS MATHEMATICAL AND READING LEVELS, I BELIEVE?

A YES, SIR, I DID.

Q WOULD IT BE YOUR PROFESSIONAL OPINION THAT JONATHAN SIMMONS EITHER HAD A MENTAL OR AN EMOTIONAL DEVELOPMENT THAT WAS SIGNIFICANTLY BELOW THAT OF A PERSON OF HIS CHRONOLOGICAL AGE?

A AN EMOTIONAL DEVELOPMENT?

Q YES.

A I'M NOT SURE I RELATE THAT TO THE READING AND ARITHMETIC.

Q OH, I'M SORRY. MAYBE THEY ARE NOT RELATED, BUT JUST IN GENERAL BASED ON YOUR PROFESSIONAL EXPERIENCES, WOULD HIS EMOTIONAL DEVELOPMENT BE LESS THAN THAT OF SOMEBODY IN THE SAME CHRONOLOGICAL AGE?

A YES, SIR. USUALLY THERE IS A – WHEN SOMEONE'S DELAYED IN THEIR INTELLIGENCE, THERE IS USUALLY SOME [Tr. 1919] GENERAL DEVELOPMENTAL DELAY WHICH WOULD HAVE INCLUDED THE EMOTIONAL ASPECTS AS WELL AS SOCIAL ASPECTS AND ALL ASPECTS OF DEVELOPMENT.

Q ANSWER ANY QUESTION MR. HARPOOTLIAN MAY HAVE, DOCTOR.

CROSS EXAMINATION BY MR. HARPOOTLIAN:

* * *

[Tr. 1931] Q DOES HE HAVE – IS HE MEAN? IN YOUR – IS THIS – MAYBE THAT'S TOO SIMPLE A DIAGNOSIS. IS HE A MEAN GUY?

A MEAN?

Q YEAH, MEAN. WILL HE HURT PEOPLE IN YOUR PROFESSIONAL OPINION?

A I DIDN'T FEEL UNSAFE WITH HIM OR IN FEAR.

Q NO, SIR, IF YOU WOULD ANSWER THE QUESTION YES OR NO AND THEN YOU CAN EXPLAIN WHETHER YOU FEEL UNSAFE WITH HIM OR NOT. IS HE A DANGEROUS AND MEAN PERSON?

A I THINK THAT HE'S DANGEROUS AND A DANGEROUS PERSON AS LONG AS HE GOES INTO DISSOCIATIVE STATES, YES SIR, OF [Tr. 1932] COURSE.

Q SO, THE ANSWER IS YES, HE IS A DANGEROUS PERSON?

A YES, SIR.

Q THANK YOU.

* * *

[Tr. 1959] THE WITNESS: SUSAN PERRY, P-E-R-R-Y.

DIRECT EXAMINATION BY MR. BUNCH:

Q MS. PERRY, TELL THE JURY WHERE YOU ARE EMPLOYED?

A RICHLAND COUNTY DETENTION CENTER.

Q AND I WHAT CAPACITY?

A MEDICAL ASSISTANT.

Q WHAT DO YOU DO AS A MEDICAL ASSISTANT?

A I ASSIST DURING SICK CALL WITH THE DOCTORS AND, WITHOUT THE PHYSICIANS, ACT AS LIAISON BETWEEN THE DETENTION CENTER AND COLUMBIA AREA MENTAL HEALTH.

Q ALL RIGHT. AND IN THAT CAPACITY, HAVE YOU COME TO KNOW JONATHAN SIMMONS?

A YES, SIR, I HAVE.

Q HOW LONG HAVE YOU KNOWN JONATHAN SIMMONS?

[Tr. 1960] A SINCE THE DAY OF HIS INCARCERATION.

Q JULY 18, 1990?

A UH-HUH.

Q HAVE YOU HAD - HOW MANY TIMES HAVE YOU HAD A CHANCE TO SEE JONATHAN OVER THE LASE YEAR? ANY TYPE OF ESTIMATE THAT YOU MIGHT HAVE ON THAT OR HOW REGULARLY DO YOU SEE JONATHAN MAYBE THAT'S A BETTER WAY TO ASK THE QUESTION?

A I SEE HIM THROUGHOUT THE FACILITY ON A DAILY BASIS. I SEE HIM DIRECTLY, HIM AND I OR HIM AND I AND MEDICAL PERSONNEL, I GUESS, SINCE HIS INCARCERATION, APPROXIMATELY ONE HUNDRED TIMES.

Q OKAY. AND WHEN YOU SAY YOU SEE HIM THROUGHOUT THE FACILITY, ARE YOU ACTUALLY GOING INTO THE PRISON AREA ITSELF?

A YES, SIR.

Q ALL RIGHT. AND THEN THERE ARE OTHER OCCASIONS WHEN HE COMES INTO THE, I GUESS, YOU'D CALL IT THE DOCTORS OFFICE?

A YES, SIR.

Q WHAT TYPE OF INMATE HAS HE BEEN AT THE RICHLAND COUNTY DETENTION CENTER?

A UH –

Q IN TERMS OF HIS ADAPTING TO PRISON LIFE AND GETTING ALONG WITH THE PERSONNEL THERE?

A SINCE HE – SINCE HIS ARREST, THERE WAS A PERIOD THAT HE WENT THROUGH WHERE HE DID NOT INTERACT AT ALL. HE HAS [Tr. 1961] OVERCOME THAT PERIOD AND HE INTERACTS WELL WITH EVERYONE, BOTH OFFICERS, ANY PERSONNEL, AS WELL AS HIS CELL MATES BOTH IN THE FACILITY AN ON THE REC YARD.

Q ALL RIGHT. HAVE YOU BEEN WITH HIM ALONE IN THE PRISON?

A YES, SIR.

Q AND IN THOSE CIRCUMSTANCES HAS HE BEEN SHACKLED?

A NO, SIR.

Q HAS HE BEEN RESTRAINED IN ANY WAY?

A NO, SIR.

Q HAVE YOU TRUSTED HIM ON THOSE OCCASIONS?

A YES, SIR.

Q HAVE YOU EVER HAD A TIME WHEN YOU DIDN'T TRUST HIM?

A NO, SIR.

Q HAS HE SHOWN THE ABILITY TO REHABILITATE IN PRISON?

A YES, SIR.

Q HAS HE ADAPTED TO PRISON LIFE?

A YES, SIR.

Q NO FURTHER QUESTIONS.

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[Tr. 1974] MR. BUNCH: THANK YOU, YOUR HONOR. LADIES AND GENTLEMEN OF THE JURY, TWO WITNESSES ARE NOT AVAILABLE THAT WERE TO TESTIFY IN THIS CASE. AS RESULT, THE STATE AND THE DEFENSE HAVE AGREED UPON A STIPULATION. THAT STIPULATIONS IS AS A [sic] FOLLOWS. THE STATE HAS STIPULATED THAT THE DEFENSE COULD PRESENT TWO ADDITIONAL WITNESSES LIEUTENANT ALTON AND SERGEANT HIGGINS WHO WOULD TESTIFY THAT JONATHAN DALE SIMMONS HAS ADAPTED WELL TO PRISON LIFE AND THESE OFFICERS HAVE DIRECT KNOWLEDGE OF THIS MATTER. [Tr. 1975] LIEUTENANT ALTON AND SERGEANT HIGGINS ARE SUPERVISORS AT THE RICHLAND COUNTY DETENTION CENTER.

THE COURT: THANK YOU.

THE STATE?

THE SOLICITOR: DOES THE DEFENSE REST [sic], YOUR HONOR?

THE COURT: I BELIEVE THAT IS CORRECT.

MRS. SHEALY: THE DEFENSE HAS RESTED.

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[Tr. 2037] THE SOLICITOR: YOUR HONOR, AS TO REQUEST TO CHARGE G, I'M SURE YOU HAVE A CHARGE THAT ADDRESSES THIS [Tr. 2038] ALREADY.

THE COURT: G, OF COURSE, COMES WITHIN THE DECISION I HAVE HERETOFORE MADE IN REGARD TO THE MEANING OF THESE TERMS. I'M GOING TO HANDLE IT IN MY FASHION. YOU LAWYERS ARE NOT TO DISCUSS PAROLE OR THE MEANING OF THOSE WORDS. WE JUST USE THEM IN THEIR ORDINARY SENSE IN YOUR PRESENTATION. IF THERE IS A JURY QUERY IN THAT REGARD, I'M READY TO RESPOND UNDER MY PRIOR RULING.

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[Tr. 2051] THE SOLICITOR: PLEASE THE COURT, YOUR HONOR? MR. FOREMAN, LADIES AND GENTLEMEN, THIS WILL BE THE LAST OPPORTUNITY I HAVE TO PRESENT ANYTHING TO YOU IN THIS TRIAL. AND THAT MAY COME AS A WELCOMED RELIEF TO SOME OF YOU. IT HAS BEEN ALMOST A WEEK SINCE WE MET, SOME OF US LAST MONDAY MORNING BEGAN THE PROCESS OF SELECTING THIS JURY AND AS YOU TOOK THIS WITNESS STAND, YOU WERE ASKED TO PUT YOUR HAND ON THIS BIBLE AND YOU WERE ASKED TO TELL THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH.

NOW, AT THIS STAGE OF THE PROCEEDINGS, THE INNOCENCE OR GUILT OF THE DEFENDANT, JONATHAN SIMMONS, IS NO LONGER AN ISSUE. YOU, AS A COLLECTIVE BODY, HAVE FOUND BEYOND A REASONABLE DOUBT AND TO THE

DEGREE YOU RELIED ON CIRCUMSTANTIAL EVIDENCE TO A MORAL CERTAINTY THAT HE MURDERED JOSIE LAMB AND HE COMMITTED THE CRIMES OF BURGLARY AND LARCENY. THE ISSUE THAT WE CONFRONT THIS MORNING IS IN SOME WAYS EASIER AND SOME WAYS HARDER TO RESOLVE THAN THE ISSUE YOU CONFRONTED LAST THURSDAY. I WANT TO TALK TO YOU FOR A MOMENT ABOUT THAT DECISION IN GENERAL TERMS AND THEN [Tr. 2052] I WANT TO TALK TO YOU ABOUT THE SPECIFIC DECISION IN THIS CASE.

FIRST OF ALL, THE DEATH PENALTY. EACH ONE OF YOU PUT YOUR HAND ON THIS BIBLE AND UNDER OATH TOOK THIS WITNESS STAND AND WAS ASKED THIS QUESTION, IN THE PROPER CASE OR IF THE CIRCUMSTANCES ARE PROPER, COULD YOU SENTENCE SOMEONE TO DEATH. MORE, SPECIFICALLY, EACH AND EVERY ONE OF YOU WERE ASKED COULD YOU SIGN YOUR NAME TO THE VERDICT FORM IN THIS CASE, THE DEATH VERDICT, SENTENCING SOMEONE TO DEATH AND THE ANSWER WAS YES. SO, THE ISSUE OF THE MORALITY OR IMMORALITY, THE RIGHTNESS OR WRONGNESS OF THE DEATH PENALTY IS NOT BEFORE US THIS MORNING. BECAUSE EACH AND EVERY ONE OF YOU HAVE ALREADY AGREED THAT IT IS APPROPRIATE IN SOME CIRCUMSTANCES. SO, WE NEXT COME TO WHAT ARE THOSE CIRCUMSTANCES. I WOULD AGREE THAT THERE ARE MANY INSTANCES UNDER WHICH YOUR DECISION, MANY CIRCUMSTANCES AND MANY CASES UNDER WHICH YOUR DECISION WOULD BE DIFFICULT BUT NOT THIS ONE.

THE FACTS IN THIS CASE SPELL OUT A PICTURE OF A COURSE OF CONDUCT SO DEVOID OF CONSCIENCE, SO BENT ON THE MALICE THE JUDGE TOLD YOU ABOUT THE OTHER DAY, SO LACKING IN COMPASSION AND SOCIAL CONSCIENCE THAT IT COMPELS ONE, IT MANDATES ONE TO REACH THE CONCLUSION THAT DEATH IS WARRANTED.

AS WE SAT IN HERE YESTERDAY, WE LISTENED TO [Tr. 2053] EVIDENCE PRESENTED BY THE DEFENSE WHICH WAS INTENDED TO, AND THEY WILL ARGUE TO YOU IN A MOMENT, TO MITIGATE THE CONDUCT OF JONATHAN SIMMONS. FOR TWO OR TWO AND A HALF HOURS WE HEARD FROM A SOCIAL WORKER, FROM AN HOUR TO AN HOUR AND A HALF WE HEARD FROM A PSYCHOLOGIST. AND IT BECAME CLEAR TO ME YESTERDAY THAT PERHAPS I WAS PREMATURE WHEN I ARGUED TO YOU IN THE GUILT STAGE OF THIS CASE THAT THEY WOULD ATTEMPT TO MAKE AN ELEPHANT DISAPPEAR. YESTERDAY'S PERFORMANCE WAS CALCULATED TO SHIFT RESPONSIBILITY FROM JONATHAN SIMMONS TO ANY ONE OF A NUMBER OF PEOPLE OR CIRCUMSTANCES TO THE FACT, INTERESTINGLY ENOUGH, THAT HIS MOTHER HAD A TOUGH TIME WHEN SHE WAS PREGNANT TO THE FACT THAT HIS FATHER WAS A HARSH DISCIPLINARIAN OR ABUSED HIM TO THE FACT THAT HE WAS SEXUALLY ABUSED, IF YOU BELIEVE THOSE TO BE FACTS, AND I WOULD SUBMIT TO YOU THE EVIDENCE YESTERDAY WAS NOT EVEN CONCLUSIVE THAT THOSE CIRCUMSTANCES WERE ONES HE LABORED UNDER. THIS PATTERN OF SEXUAL ABUSE THAT THE SOCIAL WORKER IN HIS

CHART BUILT THIS – I CAN'T REMEMBER THE GENEALOGICAL CHART ON WAS BASED ON THE FACT THAT EVERYONE ON ONE SIDE OF THE FAMILY HAD BEEN – HAD COMMITTED INCEST OR BEEN SEXUALLY ABUSED AND, YET, WE CALLED TO THE STAND TWO OF THOSE PEOPLE WHO HAD BEEN SITTING IN THE COURTROOM, TWO AUNTS WHO TESTIFIED NO, NO INCEST. THAT MITIGATION IS BUILT ON THE PREMISE THAT JONATHAN SIMMONS WAS SEXUALLY [Tr. 2054] ABUSED BY THIS LADY RIGHT HERE. JONATHAN SIMMONS, ACCORDING TO THAT SOCIAL WORKER AND HIS OWN PSYCHOLOGIST, SAYS THAT THIS WOMAN HAD SEX WITH JONATHAN SIMMONS FROM AGE 11 ON, THREE TO FIVE TIMES A WEEK. NOT ONLY DOES HE BEAT HER UP, NOT ONLY DOES HE RAPE HIS OWN GRANDMOTHER, HIS EXCUSE FOR THIS COURSE OF CONDUCT TO YOU, THE JURY, IS THAT SHE SEXUALLY ABUSED HIM FOR THE PAST TEN YEARS.

NOW, LADIES AND GENTLEMEN, IS THAT MITIGATING EVIDENCE? IS THAT WHAT YOU WOULD USE TO CALCULATE MERCY IN THIS CASE? THE ELEPHANT. I GOT THE ELEPHANT RIGHT HERE THAT THEY TRIED TO MAKE DISAPPEAR. DON'T GO BACK IN THAT JURY ROOM AND NOT LOOK AT THIS. DON'T GO BACK IN THAT JURY ROOM AND SAY, POOR, JONATHAN, A PRODUCT OF HIS ENVIRONMENT, A YOUNG MAN WHO FROM BIRTH WAS ON THIS ROAD TO RUINATION. THIS IS HIS HANDY WORK. THIS IS HOW HE LEFT JOSIE LAMB.

THE ENORMITY OF THIS CRIME PERHAPS IS LOST IN THE CLINICAL APPROACH WE TAKE IN A

COURTROOM. IT HAS TO BE VIEWED IN THE CONTEXT OF WHAT HAPPENED BEFORE IT AND WHY IT HAPPENED. THESE THREE WOMEN OVER HERE, MS. MIMS, ESPECIALLY, ON THE END. YOU REMEMBER MS. MIMS, ABOUT THIRTY DAYS BEFORE THE DEATH OF JOSIE LAMB, JONATHAN SIMMONS CAME TO HER FRONT DOOR ASKED FOR DIRECTIONS. HE WENT AROUND TO THE SIDE DOOR FORCED HIS WAY IN, FOLLOWED HER IN THROUGH TWO ROOMS, TRIPPED HER, FELL TOP [sic] OF HER. ATTEMPTED TO HAVE SEX WITH HER. TIED HER UP. CHOKED HER. [Tr. 2055] HER STATEMENT TO THE POLICE OFFICERS IS SHE FAKED DEATH BECAUSE HE HAD TIGHTENED – TIGHTENED THAT BIND AROUND HER NECK SO TIGHTLY HE THOUGHT HE WAS CHOKING HER IS WHAT SHE TOLD THE POLICE. HE LEFT HER FOR DEAD.

HIS GRANDMOTHER, OWN GRANDMOTHER, BEATEN SO BADLY THAT WHEN SHE TOOK THE STAND SHE COULDN'T REMEMBER WHO DID IT.

MS. FURTICK. YOU HEARD THE DESCRIPTION OF MS. FURTICK. BLOOD RUNNING OUT OF HER NOSE. BLOOD RUNNING OUT OF HER EARS. EYES SWOLLEN SHUT. RAPED. BEATEN. YOU HAVE ALSO HEARD TESTIMONY THAT JONATHAN SIMMONS PLED GUILTY TO THE SEXUAL ASSAULT ON HIS GRANDMOTHER AND PLED GUILTY TO THE BURGLARY AND SEXUAL ASSAULT ON MS. FURTICK. THESE CONFESSIONS AND STATEMENTS THAT WE INTRODUCED WHERE HE ADMITTED WHAT HE DID ARE CONFIRMED BY THAT GUILTY PLEA.

AS YOU WEIGH YOUR DECISION IN THIS CASE, THE JUDGE IS GOING TO TELL YOU THAT, FIRST OF ALL, THE STATE HAS TO PROVE TO YOU BEYOND A REASONABLE DOUBT THE EXISTENCE OF AN AGGRAVATING CIRCUMSTANCE, THE STATUTORY AGGRAVATING CIRCUMSTANCE. AND THE STATUTORY AGGRAVATING CIRCUMSTANCE THAT WE ARE RELYING ON IS BURGLARY. YOU HAVE ALREADY FOUND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THAT BY FINDING HIM GUILTY OF BURGLARY. THE JUDGE WILL THEN TELL YOU THAT CAN CONSIDER AND HE WILL OUTLINE FOR YOU CERTAIN STATUTORY MITIGATING CIRCUMSTANCES AND ANY OTHER MITIGATING [Tr. 2056] CIRCUMSTANCES YOU WANT TO CONSIDER. LET ME SAY THIS TO YOU. ONCE YOU FIND THAT AGGRAVATING CIRCUMSTANCE, YOU ARE AUTHORIZED BY LAW TO FIND A SENTENCE OF DEATH. IF YOU FIND EVERY MITIGATING CIRCUMSTANCE AND OTHERS, YOU ARE STILL AUTHORIZED TO FIND A SENTENCE TO DEATH.

THE ISSUE IN THIS CASE IS NOT WHY JONATHAN SIMMONS RAPED AND BRUTALLY ATTACKED THESE THREE WOMEN AND THEN DID THIS TO JOSIE LAMB. THE ISSUE IS TWOFOLD. WHAT IS THE APPROPRIATE PUNISHMENT FOR THAT COURSE OF CONDUCT? AND, AGAIN, EACH ONE OF YOU HAVE INDICATED THAT YOU FEEL THAT THE DEATH PENALTY IS APPROPRIATE IN SOME CIRCUMSTANCES. ARE THESE THE PROPER CIRCUMSTANCES? I SUBMIT TO YOU IF NOT THESE, THEN WHAT?

THE SECOND REASON THAT YOU WOULD SENTENCE SOMEONE TO DEATH. PERHAPS, OH, THE FIRST REASON, PUNISHMENT, IS ENOUGH, MIGHT BE DETERRENCE. AN I'M NOT ABOUT TO STAND UP HERE THIS MORNING AND DEBATE WITH YOU AN ISSUE THAT HAS PLAGUED SOCIETY SINCE THE BEGINNING OF TIME. WHETHER OR NOT THE SENTENCE OF DEATH FOR JONATHAN SIMMONS WILL DETER ANYBODY ELSE, I SUBMIT TO YOU THE FACT THAT IT WILL DETER HIM IS PLENTY. THAT'S ALL WE ARE HERE TO DO IS TO DEFER HIM.

HIS OWN PSYCHOLOGIST YESTERDAY, MR. EVANS, DR. EVANS TESTIFIED HE WAS "DANGEROUS". THE CENTRAL ISSUE, AGAIN, IS WHETHER YOU WILL IGNORE THE FACTS AND [Tr. 2057] CIRCUMSTANCES SURROUNDING THIS CASE AND THE COURSE OF CONDUCT OF JONATHAN SIMMONS AND BE PERSUADED BY WHAT I SUBMIT TO YOU ARE IMPROPER CONSIDERATIONS. NOT IMPROPER UNDER THE LAW BECAUSE YOU CAN CONSIDER ANYTHING YOU WANT. BUT IMPROPER IN THE SENSE OF A RATIONAL EXAMINATION AND DECISION AS TO WHAT SHOULD HAPPEN IN THIS CASE. THE DEFENSE IN THIS CASE HAS THROWN EVERYTHING EXCEPT THE KITCHEN SINK IN MITIGATION. THE SHAMELESS DISPLAY OF HIS EIGHT YEAR-OLD BROTHER YESTERDAY. THE WILLINGNESS OF THIS DEFENDANT TO DO ANYTHING TO ESCAPE, I SUBMIT TO YOU, IT'S SHAMEFUL.

LET'S LOOK AT THE PARTICULAR CIRCUMSTANCES AND I KNOW I'VE REVIEWED THIS WITH YOU THREE DAYS AGO BUT I WANT TO MAKE SURE

WE GO OVER IT AGAIN. JONATHAN SIMMONS IN HIS STATEMENT INDICATES THAT HE WAS LOOKING FOR SOMEONE NAMED JIMMY WHEN HE WENT TO JOSIE LAMB'S HOUSE. HE HAD GONE THERE A WEEK BEFORE AND HE INDICATES THAT WHEN HE WENT TO THE DOOR AND TRIED IT, A WOMAN SCREAMED AND HE RAN OFF. HE THEN CAME BACK AGAIN LOOKING FOR JIMMY. HE SAID HE OWED HIM 50 DOLLARS AND WENT TO THE DOOR. WENT IN AND SO, I'M NOT MISQUOTING HIM, "I WENT TO THE SCREEN DOOR ON THE SIDE OF THE HOUSE. I WENT IN THE DOOR AND HEARD THE WOMAN SCREAM. SHE SAID FOR ME TO GET OUT OR SHE WOULD CALL THE POLICE. I LOOKED AROUND THE REST OF HOUSE. I DIDN'T SEE ANYONE ELSE. SHE HIT ME WITH SOMETHING IN THE BACK OF THE [Tr. 2058] HEAD AND ON THE RIGHT HAND. THIS TOOK PLACE IN THE BATHROOM. I PICKED UP THE COMMODE LID AND HIT HER IN THE HEAD TWICE, SHE FELL. THAT'S WHEN I LEFT AND WENT INTO THE HOUSE AND LOOKED AROUND. A WALKED BACK TO THE BATHROOM AND STEPPED INTO SOME BLOOD. I WALKED BACK OUT THE SIDE DOOR." AND HE ADMITTED ALSO UNPLUGGING THE PHONE CORD. THIS IS A LIE. I SUBMIT TO YOU WHAT HAPPENED IN THIS CASE IS THAT WHEN JONATHAN SIMMONS CAME IN THAT BACK DOOR, JOSIE LAMB WAS SITTING ON THE TOILET. YOU REMEMBER THE TOILET AND BATHROOM IN THIS HOUSE, IF YOU COME IN THIS BACK DOOR, IS RIGHT OVER HERE. IT'S TO THE RIGHT OR TO YOUR LEFT

COMING IN THE DOOR. THAT'S WHERE THE BATHROOM IS. APPARENTLY IN THESE OLD HOUSES DOWN IN OLYMPIA, THEY'VE LOCATED THE BATHROOMS – MAYBE IT WAS OUTSIDE AT ONE POINT. THIS HOUSE IS VERY OLD. HE CAME IN THE BACK DOOR. HE KNEW WHO WAS THERE. HE HAD BEEN THERE THE WEEK BEFORE. HE KNEW IT WAS AN ELDERLY WOMAN. HE KNEW THAT SHE LIVED ALONE. HE'S RIGHT, HE DID GO IN THE REST OF THE HOUSE TO LOOK AROUND AND SEE IF ANYBODY WAS THERE AND HE UNPLUGGED THE PHONE. MS. LAMB WAS ON THE TOILET ATTEMPTING TO GO TO THE BATHROOM. SHE REACHED OVER AND GRABBED THIS TOILET PAPER. SHE NEVER GOT A CHANCE TO USE IT BECAUSE HE CAME IN THE DOOR. SHE STOOD UP AND AS SHE STOOD UP, HE GRABBED THE BACK OF THIS TOILET AND SHE YELLED AT HIM AND TOLD HIM TO GET OUT OF HER HOUSE. HE GRABBED THE TOP OF THE TOILET AND [Tr. 2059] THE FIRST BLOW WAS AS SHE WAS EITHER SITTING ON THE TOILET OR JUST GETTING UP BECAUSE THERE'S NO BLOOD ON THE TOILET SEAT. IT'S ON THE BACK OF THE TOILET. IT'S IN THE BACK OF THE SEAT, BUT THERE'S NONE HERE. IT'S HUMAN FECES RIGHT HERE ON THE CORNER AS SHE SLID OFF. SHE CONTINUED TO MOVE OVER. HER HEAD MUST HAVE BEEN ABOVE – I WOULD SUBMIT TO YOU ABOVE THIS HAMPER BECAUSE THERE IS A TRAIL OF BLOOD, BLOOD STILL RUNNING DOWN. SHE FALLS BACK UP AGAINST THE WALL. WE EVEN SEE SPLATTERS OF BLOOD UP BEHIND THIS HEATER AND A SMEAR AS SHE FELL

DOWN, IN HER RIGHT HAND STILL GRIPPING IT, THIS TOILET PAPER. AGAIN, MERCY. NINE TIMES. MERCY. NINE TIMES HE SWUNG THIS INTO HER SKULL. SHE MOVED ACROSS THE ROOM. AS SHE WENT DOWN, HE'S SWINGING. BLOOD SPLATTERING EVERYWHERE, ON HIM, ON THE WALL. A 79-YEAR-OLD WOMAN, DEFENSELESS. THIS WASN'T ANYTHING NEW TO HIM. HE HAD DONE IT BEFORE.

WHAT'S THE PATTERN HERE? MS. MIMS. WHY DID YOU PICK THE VICTIM'S HOUSE? I WAS JUST TAKING A CHANCE. WHEN I SAW THE OLD LADY AND I DECIDED TO GO IN ON HER. DID YOU HAVE A WEAPON? NO, I DIDN'T NEED ONE WITH THAT OLD LADY. AND INTERESTINGLY ENOUGH, WHAT IS THE MOTIVE HERE. WHAT'S THE MOTIVE? I SUBMIT TO YOU THE MOTIVE IS THIS. WE HAVE A PERSON WHO HAS DECIDED TO GET WHAT HE WANTS OUT OF LIFE, I SUBMIT TO YOU, THE EASIEST WAY TO GET IT IS TO PREY ON PEOPLE WHO CAN'T FIGHT BACK, WHO CAN'T RESIST. LIKE A [Tr. 2060] JACKAL CIRCLING A HERD, LOOKING FOR THE OLD. LOOKING FOR THE INFIRM. LOOKING FOR SOMEONE TO VICTIMIZE THAT CAN'T HURT HIM. HE TAKES THE TWO THINGS HE WANTS. HE NEEDS SEX. NOW, YOU MAY NOT REGARD IT AS SEX. I MIGHT NOT REGARD IT AS SEX. BUT WHEN HE WAS ASKED ABOUT MS. MIMS. I WANT YOU TO LOOK AT MS. MIMS OVER HERE. THE LADY ON THE RIGHT IN THE BLUE PANTS.

QUESTION: DID YOU EJACULATE?

ANSWER: YES JUST FROM THE FOREPLAY.

NOW, LADIES AND GENTLEMEN OF THE JURY, HE IS JUST DESCRIBED KNOCKING HER TO THE GROUND. I RUBBED MY PENIS IN THAT AREA. ANAL SEX. I COULDN'T GET IT IN. I COULDN'T GET IT IN FOR INTERCOURSE. DID YOU ATTEMPT ANAL SEX? I JUST RUBBED MY PENIS IN THAT AREA. I COULDN'T GET IT IN. DID YOU EJACULATE? YES, JUST FROM THE FOREPLAY. FOREPLAY.

I AM SORRY THAT WE HAVE TO PUT MS. MIMS AND MS. FURTICK, MS. SIMMONS THROUGH THIS PROCESS. BUT IF WE HAD NOT BROUGHT THEM HERE, THIS WOULD BE SUCH AN ANTISEPTIC, SUCH A CLINICAL VIEW FOR YOU. I WANTED YOU TO SEE WHAT THE VICTIMS OF HIS ASSAULTS LOOK LIKE. I WANTED YOU TO SEE THE PATTERN. LIKE A JACKAL CIRCLING THE HERD. HE PICKS ON THOSE WHO CAN'T FIGHT BACK. HE PICKS ON THOSE WHO CAN'T DEFEND THEMSELVES. HE PICKS ON THOSE WHO HE CAN HURT OR KILL WITH LITTLE OR NO HARM TO HIMSELF. ATTACKED FOUR OTHER ADULTS. NOT A SCRATCH. IN THEIR HOMES. NOT A [Tr. 2061] SCRATCH. COULD DO WHAT HE WANT [sic], TAKE WHAT HE WANTS. WENT TO THE REFRIGERATOR ON ONE OF THESE AFTER HE GETS DONE SEXUALLY ASSAULTING AND BEATING UP A 70-YEAR-OLD WOMAN, HE GOES TO THE REFRIGERATOR AND GETS A SOFT DRINK AFTER GETTING HER MONEY, WHAT DID YOU TAKE? MS. MIMS, ABOUT 50 DOLLARS FROM HER PURSE AND A DRINK FROM HER REFRIGERATOR. CASUAL. NOTHING SERIOUS ABOUT THIS TO HIM. ALL IN A DAY'S WORK. DEVOID OF SOCIAL CONSCIENCE.

NOW, DO WE FOCUS ON HOW HE GOT THAT WAY BECAUSE, AGAIN, THAT IS A QUESTION WHICH HAS BAFFLED SOCIOLOGISTS, PSYCHOLOGISTS, PHILOSOPHERS, RELIGIOUS LEADERS FOR CENTURIES AND WE ARE NOT GOING TO RESOLVE IT HERE TODAY AND THAT'S NOT YOUR JOB.

YOU WILL HEAR IN A MOMENT FROM DEFENSE COUNSEL AND THEY ARE GOING TO SUBMIT, TO YOU GIVE YOU A LITANY OF REASONS TO EXCUSE THIS CONDUCT THEY CALL MITIGATING FACTORS. THEY ARE GOING TO TELL YOU TO CONSIDER EVIDENCE THAT THE MURDER WAS COMMITTED WHILE UNDER THE INFLUENCE OF MENTAL OR EMOTIONAL DISTURBANCE. THEY ARE GOING TO ASK YOU TO CONSIDER THE FACT THAT THEIR CLIENT DIDN'T APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR BE ABLE TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW OR WAS SUBSTANTIALLY IMPAIRED. THEY WANT YOU TO CONSIDER THE AGE OR MENTALITY OF HIM AT THE TIME OF THE CRIME.

MR. QUINN: YOUR HONOR, I'M GOING TO OBJECT. [Tr. 2062] YOUR HONOR IS GOING TO CHARGE THE JURY THAT THEY MUST CONSIDER THOSE FACTORS AS I UNDERSTAND IT.

THE COURT: THAT IS CORRECT. PROCEED, MR. SOLICITOR.

THE SOLICITOR: THEY ARE GONG TO ASK YOU TO CONSIDER THE EFFECTS OF SEXUAL ABUSE DURING HIS INFANCY, CHILDHOOD AND ADOLESCENCE, THE EFFECTS OF PHYSICAL ABUSE IN

INFANCY, CHILDHOOD AND ADOLESCENCE, THE EFFECTS OF A DYSFUNCTIONAL FAMILY, EVIDENCE THAT HIS FATHER NEVER COULD DEVELOP A FATHER-SON RELATIONSHIP, HE WAS NEGLECTED AS A CHILD, THE CIRCUMSTANCES SURROUNDING THE PREGNANCY OF HIS MOTHER, HE WAS RAISED IN DEPRIVED UNDER PRIVILEGED CIRCUMSTANCES, THAT HE EXHIBITED EARLY SIGNS OF MENTAL OR EMOTIONAL DISTURBANCE, HIS I.Q., LACK OF EDUCATION AND IMPAIRED REASON AND JUDGMENT, HIS MENTAL OR EMOTIONAL DEVELOPMENT IS SIGNIFICANTLY BELOW THAT OF PERSONS OF HIS CHRONOLOGICAL AGE, HIS MENTAL OR EMOTIONAL DISTURBANCE WAS AGGRAVATED THROUGHOUT HIS CHILDHOOD AND EARLY ADULTHOOD BY THE ACTIONS AND INTERACTIONS OF FAMILY MEMBERS. THAT JONATHAN SIMMONS' USE, MISUSE OR ABUSE OF DRUGS WAS AS A RESULT OF HIS MENTAL OR EMOTIONAL DISTURBANCE. THAT THE AFFECTS [sic] OF COCAINE AND OTHER DRUGS AT THE TIME OF THE CRIME WAS A MITIGATING CIRCUMSTANCE. THAT HE DID NOT RESIST ARREST. THAT HE VOLUNTARILY CONFESSED. THAT HIS REMORSE OF THE CRIME IS A MITIGATING CIRCUMSTANCE. HIS COOPERATION [Tr. 2063] WITH LAW ENFORCEMENT IS A MITIGATING CIRCUMSTANCE. HIS ABILITY TO ADJUST AND ADAPT TO PRISON IS A MITIGATING CIRCUMSTANCE AND HE HAS SHOWN NO TENDENCY TOWARDS VIOLENCE AGAINST OTHERS AS A MITIGATING CIRCUMSTANCE. HE'S ADAPTED WELL TO PRISON SINCE HE'S BEEN IN JAIL. HE'S TREATABLE IN PRISON. HE'S

CAPABLE OF HELPING OTHER INMATES AND ANYTHING ELSE THAT YOU COULD POSSIBLY GARNER, SCRATCH, DIG FROM THE EVIDENCE THEY PRESENTED.

NOW, THE JUDGE IS GOING TO TELL YOU, YOU MUST CONSIDER THESE. CONSIDER. NOT ADOPT, NOT BUY, NOT BELIEVE, CONSIDER. YOU MUST REACH A VERDICT THAT YOU ARE COMFORTABLE WITH BASED ON ALL OF THE FACTS AND CIRCUMSTANCES IN THIS CASE. YOU MUST REACH A VERDICT WHICH SPEAKS THE TRUTH. YOU MUST REACH A VERDICT THAT MAKES YOU COMFORTABLE. YOU MUST REACH A VERDICT THAT YOU CAN COME OUT AND LOOK HIM IN THE EYE AND PRONOUNCE, BUT, LADIES AND GENTLEMEN, HIS EYES AREN'T THE ONLY ONES. REMEMBER MS. FURTICK. REMEMBER MS. SIMMONS. REMEMBER MS. MIMS. LOOK IN THEIR EYES. AND POOR JOSIE LAMB, THE TERROR, THE FEAR, THE PAIN.

I'M NOT GOING TO STAND UP HERE, STAND UP HERE AS SOME PROSECUTORS DO AND TRY TO EMOTE SOME EMOTIONAL RESPONSE FROM YOU. I'M NOT GOING TO STAND UP HERE AND WEEP AND WAIL AND SCREAM AND YELL BECAUSE THAT'S NOT WHAT THIS IS ABOUT. YOUR VERDICT SHOULDN'T BE RETURNED IN ANGER. [Tr. 2064] YOUR VERDICT SHOULDN'T BE AN EMOTIONAL CATHARSIS. YOUR VERDICT SHOULDN'T BE ONE THAT IS A RESPONSE TO THAT EIGHT-YEAR-OLD KID SITTING OVER THERE AND REALLY SHOULDN'T BE A RESPONSE TO THE GRUESOME GROTESQUE

HANDIWORK OF JONATHAN SIMMONS. YOUR VERDICT SHOULD BE A RESPONSE OF SOCIETY TO SOMEONE WHO IS A THREAT. YOUR VERDICT WILL BE AN ACT OF SELF-DEFENSE.

WELL, AS THE JUDGE TOLD YOU INITIALLY, THIS PROCESS IS CALLED FINAL ARGUMENT. HE SAYS THAT'S A MISNOMER BECAUSE YOU DON'T GET TO ARGUE WITH ME. YOU SEE, I DON'T GET TO STAND UP HERE AND SAY SOMETHING AND THEN ONE OF YOU SAY NO, NO THAT'S WRONG. AND THEN I GET TO SAY, BUT DID YOU THINK ABOUT THIS.

IN A MOMENT AT LEAST TWO AND PERHAPS THREE OF HIS ATTORNEYS ARE GOING TO HAVE AN OPPORTUNITY TO TALK TO YOU. THEY GET THE LAST ARGUMENT. I DON'T GET TO SAY ANOTHER WORD WHATSOEVER. AND THEN THE JUDGE IS GOING TO TELL YOU WHAT THE LAW IS IN THIS CASE. LISTEN VERY CAREFULLY TO THAT LAW.

THE DEFENSE IN THIS CASE AS TO SENTENCE, I THINK I HAVE OUTLINED FOR YOU, IT'S A DIVERSION. IT'S PUTTING THE BLAME ON SOCIETY, ON HIS FATHER, ON HIS GRANDMOTHER, ON WHOEVER ELSE HE CAN, SPREADING IT OUT TO AVOID THAT PERSONAL RESPONSIBILITY. THAT HE CAME FROM A DEPRIVED BACKGROUND. THAT HE DIDN'T HAVE ALL OF THE BREAKS IN LIFE [Tr. 2065] AND CERTAINLY THAT HELPS SHAPE SOMEONE. BUT WE ARE NOT CONCERNED ABOUT HOW HE GOT SHAPED. WE ARE CONCERNED ABOUT WHAT TO DO WITH HIM NOW THAT HE IS IN OUR MIDST.

AS YOU LISTEN TO DEFENSE COUNSEL, IF THEY BECOME EMOTIONAL AND ASK YOU FOR MERCY, REMEMBER, THEY DIDN'T KILL ANYBODY. TOM QUINN, JENNIFER KNEECE SHEALY, TOMMY BUNCH THEY DIDN'T BEAT JOSIE LAMB'S SKULL IN. THEY DIDN'T RAPE MS. FURTICK OVER THERE AND BEAT HER TO A PULP. THEY DIDN'T RAPE MS. SIMMONS OVER THERE AND BEAT HER TO A PULP. THEY DIDN'T TIE UP MS. MIMS AND TERRORIZE HER AND BEAT HER UP AND RAPE HER. THEY DIDN'T DO THAT. HE DID.

AS THEY ATTEMPT TO SHIFT BLAME TO MOM AND DAD, SOCIETY, DYSFUNCTIONAL FAMILY, INCEST, REMEMBER HIS DAD, HOWEVER BAD HE IS, HE WASN'T DOWN ON OLYMPIA AVENUE ON THE MORNING OF JULY 16TH – THE EVENING OF JULY 16TH. HIS DAD WASN'T IN MS. FURLICK'S HOUSE OR MS. MIMS' HOUSE. THIS IS AN ATTEMPT ON THEIR PART, I SUBMIT TO YOU, TO MAKE YOU FEEL UNEASY. TO PUT A DOUBT IN YOUR MIND ABOUT WHAT YOU SHOULD DO.

I WANT YOU TO AS YOU THINK ABOUT THAT, AS YOU LISTEN TO WHAT THEY HAVE TO SAY, REMEMBER THIS, EACH AND EVERY ONE OF YOU CAME UP PUT YOUR HAND ON THE BIBLE AND SAID I CAN SIGN MY NAME TO THAT DEATH VERDICT UNDER THE PROPER CIRCUMSTANCES. IF NOT THIS, IF YOU CANNOT SIGN YOUR NAME TO THAT VERDICT AND COME OUT AND LOOK THIS MAN IN THE [Tr. 2066] EYE, YOU WILL VIOLATE, I SUBMIT, THAT OATH.

YOU ARE NOT HERE TO GIVE MERCY. YOU ARE HERE TO DO JUSTICE. JUSTICE DEMANDS A VERDICT OF DEATH IN THIS CASE. IF I IN THE PROCESS OF MY ARGUMENT TODAY OR MY PRESENTATION HAVE OFFENDED YOU IN ANY WAY WHATSOEVER, PLEASE, DON'T HOLD THAT AGAINST THE STATE OF SOUTH CAROLINA IF MR. GASSER OVER HERE OR MR. GIESE WHO HAVE WORKED WITH ME ON THIS CASE OR ANY OF THE OFFICERS WHO'VE TESTIFIED OR ANY OF THE WITNESSES THAT WE HAVE PUT UP, HAVE OFFENDED YOU IN ANY WAY, PLEASE, DON'T HOLD THAT AGAINST THE STATE OF SOUTH CAROLINA. DO WHAT IS RIGHT BASED ON THE FACTS. DON'T TAKE THE EASY WAY OUT AND SAY WELL, THAT'S TOUGH. IT IS TOUGH. DON'T AVOID YOUR RESPONSIBILITY. IT WILL BE AN ACT OF SELF-DEFENSE. THANK YOU.

THE COURT: COUNSEL.

MR. BUNCH: YES, YOUR HONOR.

THE COURT: MR. BUNCH.

MR. BUNCH: LET ME TAKE CARE OF A LITTLE HOUSECLEANING FIRST, YOUR HONOR. I AM GOING TO USE THE PODIUM, LADIES AND GENTLEMEN, BECAUSE I'M NOT AS CONTEMPORANEOUS OR OFF-THE-CUFF, WHATEVER YOU WANT TO CALL IT.

MR. FOREMAN, LADIES AND GENTLEMEN OF THE JURY, I COME TO YOU TODAY WITH A DIFFICULT TASK. I COME TO YOU TODAY FEELING INADEQUATE FOR THE TASK. ASKING YOU TO [Tr. 2067]

INCARCERATE JONATHAN SIMMONS TO PRISON FOR LIFE. I DON'T ASK YOU TO EXCUSE HIS CONDUCT. WE CAN'T CONDONE HIS CONDUCT AND WE MUST BLAME JONATHAN SIMMONS FOR THAT CONDUCT. HE IS THE PERPETRATOR IN THIS CASE BUT UNLIKE THE SOLICITOR AS HE SAYS THE ISSUE IN THIS PART OF THE TRIAL IS AND WHAT WE HAVE TO FOCUS ON IS WHY HE DID IT. THAT'S WHY YOU HAVE TWO SEPARATE PARTS OF THE TRIAL. THAT'S WHY THE FIRST PART IS CONCERNED ONLY WITH WHETHER HE'S GUILTY OR INNOCENT AND THE SECOND PART IS YOUR DETERMINATION OF THE PENALTY OR THE PUNISHMENT.

SO, THE SOLE PURPOSE OF THE SECOND PART OF THE TRIAL IS TO FOCUS ON SOME RATIONAL BASIS OR UNDERSTANDING OF WHY THE CRIME WAS COMMITTED. AND I SUBMIT TO YOU, LADIES AND GENTLEMEN, EVEN THOUGH WE CAN'T CONDONE IT, HE IS THE BLAMEWORTHY PERSON, WE CAN'T EXCUSE IT, WE CAN COME TO A RATIONAL BASIS AND UNDERSTANDING AS TO WHY JONATHAN ACTS THIS WAY. THAT RATIONAL BASIS AND UNDERSTANDING WAS PRESENTED YESTERDAY IN THAT JONATHAN DALE SIMMONS IS SUFFERING FROM A SEVERE EMOTIONAL DISORDER. THIS IS CALLED A DISSOCIATIVE DISORDER IN THE MEDICAL LINGO OR TERMINOLOGY. THIS IS THE OPINION AND DIAGNOSIS OF DR. JAMES R. EVANS WHO HAS BEEN DOING THIS TYPE OF WORK FOR THIRTY YEARS. HE'S BEEN A PROFESSOR AT THE UNIVERSITY OF SOUTH CAROLINA FOR TWENTY

YEARS. HE HAS EXPERIENCE IN THIS AREA. THIS IS WHAT HE DOES.

[Tr. 2068] LET'S EXAMINE SOME OF THE EVIDENCE THAT CAME BEFORE YOU YESTERDAY. LET'S SEE WHAT THE PEOPLE AGREED UPON, WHAT WAS UNCONTROVERTED AND LET'S SEE WHAT THERE WAS SOME DISAGREEMENT ON.

FIRST OF ALL, EVERY DOCTOR THAT CAME BEFORE YOU YESTERDAY AGREED THAT PHYSICAL ABUSE CAN CAUSE THE MENTAL DISORDER WHICH JONATHAN HAS. EVERY DOCTOR THAT CAME BEFORE YOU YESTERDAY AGREED THAT SEXUAL ABUSE CAN CAUSE A DISSOCIATIVE DISORDER AND EVERYBODY THAT CAME BEFORE YOU YESTERDAY, WHEN THE QUESTION WAS SUBMITTED TO THEM, AGREED THAT, YES, ONE CAN FEIGN SYMPTOMS OF A MENTAL ILLNESS, ONE CAN GIVE INAPPROPRIATE RESPONSES IN PSYCHOLOGICAL TESTING, BUT AND AT THE SAME TIME, THEY CAN HAVE THAT MENTAL ILLNESS OR ANOTHER MENTAL ILLNESS. AT THE SAME TIME THEY CAN BE MENTALLY ILL AND HAVE A MENTAL DISORDER. THAT'S WHAT EVERYBODY HAS AGREED UPON.

LET'S LOOK AT SOME THINGS THAT ARE UNCONTROVERTED. JONATHAN'S FAMILY WAS ABSOLUTELY AND COMPLETELY DYSFUNCTIONAL. IF YOU NEED NO FURTHER EVIDENCE OF THAT, LOOK AROUND THE COURTROOM, LADIES AND GENTLEMEN OF THE JURY. JOHN SIMMONS' FATHER HAS NOT BEEN HERE ALL WEEK WHILE HIS SON HAS BEEN ON TRIAL. HE'S ABANDONED HIM THIS

WEEK JUST LIKE HE ABANDONED HIM AND HAD NOTHING TO DO WITH HIM AND BEAT HIM FROM THE TIME HE WAS A CHILD.

WHAT ELSE IS UNCONTROVERTED? JONATHAN SIMMONS [Tr. 2069] FAILED THE ONLY DISSOCIATION TEST THAT WAS EVER GIVEN TO HIM. DR. EVANS GAVE HIM A TEST ONCE HE SUSPECTED DISSOCIATIVE DISORDER, TO DETERMINE WHETHER HE HAD THAT DISEASE, WHETHER HE HAD THAT MENTAL ILLNESS. HE SCORED POSITIVE RESPONSES ON TWENTY OF THE 28 TESTS OR QUESTIONS OR WHATEVER THEY WERE THAT DR. EVANS GAVE HIM. THE STATE HOSPITAL NEVER TESTED HIM FOR DISSOCIATION. THEY TESTED HIM TO SEE IF HE COULD UNDERSTAND HIS MIRANDA RIGHTS THAT THESE POLICEMEN GIVE HIM. THEY TESTED HIM TO SEE IF HE COULD ASSIST HIS ATTORNEYS IN PRESENTING A DEFENSE. WHAT DOES THAT TELL YOU ABOUT ANY REASON? THEY NEVER TESTED HIM FOR THE DISSOCIATION.

WHAT ELSE IS UNCONTROVERTED? THESE DRUGS AND ALCOHOL THAT JONATHAN CHOSE TO USE AND IT WAS HIS CHOICE. IT WASN'T ANYBODY ELSE'S CHOICE. IT WAS HIS CHOICE. THE DRUGS AND ALCOHOL THAT HE USED EXACERBATE OR MAKE WORST [sic] OR TRIGGER THAT DISSOCIATIVE DISORDER.

WHAT IS IN DISPUTE? SOME OF THESE ITEMS ARE MORE DISPUTED THAN OTHERS. BUT FIRST OF ALL, LET'S START WITH HIS INTELLIGENCE. HE'S

BEEN DIAGNOSED AS HAVING BORDERLINE INTELLECTUAL FUNCTIONING. HE NEVER DID WELL IN SCHOOL. HE WAS IN SPECIAL EDUCATION CLASSES. HISTORICALLY, HIS INTELLIGENCE LEVEL HAS BEEN DIAGNOSED AS BORDERLINE INTELLIGENCE FUNCTIONING. THAT MEANS HE IS BARELY ABOVE MENTALLY RETARDED. THE VALID AND CONSISTED TEST SCORES WE [Tr. 2070] HAVE SHOW [sic] IN THE 70'S. MENTAL RETARDATION IS AT 70. THE STATE HOSPITAL AGREED IN 1990 THAT THAT WAS THE LEVEL OF HIS INTELLIGENCE. DR. ELLISON, THE DOCTOR THAT WAS PUT ON THE STAND YESTERDAY BY THE STATE, SAID IN 1980 OR 1990, THAT IS, HE SIGNED OFF ON THE REPORT FOR THE STATE HOSPITAL, BORDERLINE INTELLIGENCE FUNCTIONING. NOW, SOMEHOW, AFTER A ONE-HOUR INTERVIEW, HE'S COME IN HERE AND CHANGED HIS DIAGNOSES A YEAR LATER TO SAY OH, HE'S MUCH SMARTER THAN WE ORIGINALLY GAVE HIM CREDIT FOR. YET, HE'S CONTRADICTING THE DIAGNOSIS OF HIS OWN STAFF. HE'S CONTRADICTING YEARS OF HISTORY, YEARS OF TESTING.

THE USE OF ALCOHOL OR DRUGS. LIEUTENANT WILSON TESTIFIED – WELL, LIEUTENANT WILSON TESTIFIED THAT HE TOOK JONATHAN SIMMONS' STATEMENT IN THE JOSIE LAMB MATTER. LIEUTENANT WILSON WROTE THE STATEMENT OUT AND SAID I WAS NOT UNDER THE INFLUENCE OF ALCOHOL OR DRUGS. LIEUTENANT WILSON'S COWORKER, MR. NELSON, COMES UP AND SAID OH, YES, WHILE JONATHAN WAS TAKING US AND AROUND SHOWING THE EVIDENCE, HE TOLD US

ON SEVERAL OCCASIONS DURING THAT DAY, THAT YES, HE WAS UNDER THE INFLUENCE OF ALCOHOL OR DRUGS. THE SAME FACTOR WHICH TRIGGERS THIS DISSOCIATIVE STATE.

NOW, WHAT ABOUT THE SEXUAL ABUSE? THAT'S ANOTHER DISPUTED AREA, OBVIOUSLY. DICK BOYLE, A SOCIAL WORKER THAT CAME IN HERE AND TESTIFIED YESTERDAY IS RETIRED AND A LIEUTENANT COMMANDER IN THE NAVY. HE WORKED HIMSELF UP [Tr. 2071] THROUGH THE RANKS. FROM – I DON'T KNOW WHAT THEIR LOWEST RANK IS IN THE NAVY. IT WOULD BE A PRIVATE IN THE ARMY. BUT HE WORKED HIS WAY UP THROUGH IN THE RANKS TO BECOME AN OFFICER IN THE NAVY. HE HAS SEVERAL YEARS OF SOCIAL EXPERIENCE. HE'S LICENSED IN TWO STATES. HE IS IMMINENTLY QUALIFIED ALL FOR HIS OPINION ON THE SEXUAL ABUSE AND HISTORY IN THE FAMILY. AND, I SUBMIT TO YOU, LADIES AND GENTLEMEN OF THE JURY, HE WOULD NOT PUT HIS INTEGRITY AND HE WOULD NOT PUT HIS CAREER ON THE LINE BY COMING UP HERE AND TELLING SOMETHING TO YOU THAT HE DIDN'T FULLY BELIEVE IN. AND THE SAME THING WITH DR. EVANS WHO HAS LIVED IN THIS TOWN FOR 20 SOMETHING YEARS NOW. HE BELIEVES THAT THE SEXUAL ABUSE OCCURRED AND HE BELIEVES THAT BASED ON HIS THIRTY YEARS EXPERIENCE AND PSYCHOLOGICAL EVALUATION, THAT THE SEXUAL ABUSE OCCURRED. BUT NOT ONLY DOES HE BELIEVE IT FOR THAT REASON BUT HE CONFIRMED IT WITH A SIMPLE TEST OF THE RORSCHACH PROCEDURE OR

THE RORSCHACH TEST. AND THIS IS NOT A TEST – THIS IS A TEST THAT THE STATE HOSPITAL DIDN'T PERFORM EITHER. THE STATE HOSPITAL NEVER GAVE HIM THE RORSCHACH TEST. DR. EVANS SAID THAT THE RESULTS OF THE RORSCHACH, THE RESULTS OF THAT OBJECTIVE TEST WERE COMMENSURATE WITH SEXUAL ABUSE. IT'S INTERESTING TO KNOW THAT WHEN DR. ELLISON AND DR. MCKEE, THE STATE HOSPITAL'S EMPLOYEES, THEY WORK FOR THE STATE, IT'S INTERESTING TO NOTE WHEN THEY GOT ON THE STAND THEY DIDN'T EVEN TO [sic] ATTEMPT [Tr. 2072] TO DISPUTE THAT JONATHAN WAS SEXUALLY ABUSED. THEY DIDN'T EVEN OFFER AN OPINION ON THAT ISSUE. THEIR REPORTS DON'T EVEN SHOW THAT THEY ADDRESSED THE AREA. THEY DIDN'T EVEN INQUIRE INTO THE AREA OF SEXUAL ABUSE WHEN HE STAYED AT THE STATE HOSPITAL FOR TWO WEEKS LAST SUMMER.

WHAT WE HAVE DONE IS DICK BOYLE HAS SPENT 70 HOURS WORKING ON THIS CASE, COMPILING A SOCIAL HISTORY OF THE FAMILY. SEVENTY HOURS. THE STATE HOSPITAL HAD A SOCIAL WORKER INTERVIEW JONATHAN FOR AN HOUR AND INTERVIEW HIS MOTHER FOR AN HOUR AND FROM THAT, THEY COMPILE A SOCIAL HISTORY, A SOCIAL HISTORY THAT DIDN'T EVEN INQUIRE OF ANY SEXUAL ABUSE. WE HAVE PRESENTED FIRST-PERSON ACCOUNTS OF SEXUAL ABUSE FROM THIS FAMILY. WE HAVE ROBIN SIMMONS ON THE STAND TESTIFYING ABOUT THE ABUSE FROM HER FATHER. DICK BOYLE WENT OUT AND INTERVIEWED FAMILY

MEMBERS WHO RECOUNTED TO HIM FIRST-HAND ACCOUNTS OF SEXUAL ABUSE.

I SUBMIT TO YOU, LADIES AND GENTLEMEN OF THE JURY, THAT WHERE YOU HAVE SMOKE, THERE'S FIRE AND ALTHOUGH THERE'S NO DIRECT EVIDENCE THAT ESTELLE SIMMONS SEXUALLY ABUSED JONATHAN, THE SMOKE IS THERE, THE HISTORY IS IN THE FAMILY AND JONATHAN SIMMONS WAS SEXUALLY ABUSED.

FINALLY, THE BIGGEST ITEM IN DISPUTE, I GUESS, IS THE ULTIMATE DIAGNOSIS OF DR. EVANS, THE DISSOCIATIVE DISORDER. THERE ARE THREE COMPONENTS AS I UNDERSTAND IT COMING FROM THE WITNESS STAND. I'LL BREAK IT DOWN INTO [Tr. 2073] THREE. THERE MAY BE MORE, BUT THERE ARE AT LEAST THREE COMPONENTS THAT YOU DO WHEN MAKING A PSYCHOLOGICAL OR A PSYCHIATRIC EVALUATION OF SOMEONE.

THE FIRST COMPONENT IS YOU INTERVIEW THE SUBJECT. THE SECOND COMPONENT IS YOU PERFORM CERTAIN TESTS AND THE THIRD COMPONENT IS YOU COMPILE A SOCIAL HISTORY. DR. EVANS INTERVIEWED JONATHAN SIMMONS, HE SAYS, ON THREE OCCASIONS. THOSE INTERVIEWS EACH LASTED OVER TWO HOURS. HE WAS WITH JONATHAN SIMMONS PROBABLY – I DON'T KNOW, A TOTAL OF EIGHT TO TEN HOURS. DR. MCKEE SAW HIM A TOTAL OF THREE HOURS AT THE STATE HOSPITAL. DR. ELLISON SAW HIM AN HOUR. MAYBE THEIR SOCIAL WORKER INTERVIEWED JONATHAN

AND HIS MOTHER FOR THREE HOURS. SHE CERTAINLY DIDN'T SPEND 70 HOURS COMPILING A SOCIAL HISTORY AS DICK BOYLE DID. SO, THE INTERVIEW PROCESS USED BY THE STATE HOSPITAL OR THE FIRST COMPONENT OF ESTABLISHING A PSYCHOLOGICAL PROFILE OR ASSESSMENT IS SUBSTANTIALLY LESS THAN THAT USED BY DR. EVANS. THE TEST – I HAVE ALREADY TOLD YOU ABOUT. THEY DIDN'T PERFORM THE MAJOR TEST, THE DISSOCIATION TEST. THEY DIDN'T EVEN CONSIDER IT AND NOT ONLY DID THEY NOT – IN ADDITION TO THE FACT THAT DR. EVANS GAVE THE DISSOCIATION TEST, HE ALSO GOT CONFIRMING DATA BY GIVING A QUESTIONNAIRE TO THE FAMILY. AND THEN, OF COURSE, THE SOCIAL HISTORY I HAVE ALREADY COMMENTED ON. SO, EACH OF THE THREE BASES ON WHICH YOU WOULD MAKE A PSYCHOLOGICAL ASSESSMENT, DR. EVANS WAS [Tr. 2074] PROVIDED WITH ADDITIONAL INFORMATION, MORE INFORMATION AND BETTER TESTING TO MAKE HIS EVALUATION. THE SOCIAL HISTORY AND BEHAVIOR IN THIS CASE PROVED THE DIAGNOSIS OF THE DISSOCIATIVE DISORDER. ALL OF THE CAUSES ARE PRESENT. THE SEXUAL ABUSE AND THE PHYSICAL ABUSE AND THE DYSFUNCTIONAL FAMILY. THE SYMPTOMS WERE PRESENT. THE TRANCE-LIKE STATES. THE LACK OF MEMORY AND THE ABNORMAL CONDUCT WHEN FACED WITH THE STRESSORS THAT MIGHT BRING ON THE DISSOCIATIVE DISORDER AND THEN YOU COMBINE THAT WITH THE ALCOHOL AND DRUGS AND WHAT YOU'VE DONE IS TRIGGER THE DISSOCIATE STATE.

WHAT IS INTERESTING AND COMPELLING, LADIES AND GENTLEMEN OF THE JURY AND MR. FOREMAN, IS THAT EVERY INCIDENT OF VIOLENT OR ABNORMAL CONDUCT IN WHICH MR. SIMMONS ENGAGED WAS EITHER DIRECTED AT HIS FATHER'S PROPERTY AND HIS FATHER WAS ONE WHO HAD BEATEN HIM WITH THE FAN BELT, REGULARLY BEAT HIM SEVERAL TIMES A WEEK OR IT WAS DIRECTED AT ELDERLY WOMEN AFTER HE WAS SEXUALLY ABUSED BY HIS GRANDMOTHER. IS HE DANGEROUS? DOCTOR EVANS SAID HE WAS DANGEROUS. BUT IS HE DANGEROUS WHEN HE IS AWAY FROM THESE STRESSORS THAT PROMOTE THE DISSOCIATIVE BEHAVIOR AND, OF COURSE, IS HE TREATABLE. THAT'S EVEN ANOTHER ISSUE. BUT IS HE DANGEROUS? HE'S NOT GOING TO BE DANGEROUS IN A PRISON SETTING. HE'S NOT GOING TO BE EXPOSED TO WOMEN. HE'S NOT GOING TO BE EXPOSED TO HIS FATHER. HE'S GOING TO BE PUT IN AN ENVIRONMENT WHERE HE'S NOT GOING TO BE [Tr. 2075] DANGEROUS.

LADIES AND GENTLEMEN OF THE JURY, MRS. SHEALY WILL ADDRESS YOU MOMENTARILY. I'M ABOUT TO WRAP UP. BUT I POSE THE FOLLOWING QUESTION TO YOU AND THIS COMES ALONG WITH MR. HARPOOTLIAN'S THEME ABOUT BEING SO DEVOID OF SOCIAL CONSCIENCE. HE SAID THAT SEVERAL TIMES. WOULD ANYONE ACT THIS WAY UNLESS HE OR SHE WERE SICK? HE HAS A MENTAL DISORDER. THE TECHNICAL NAME FOR IT IS NONSPECIFIC DISSOCIATIVE DISORDER. THE ANSWER IS, OBVIOUSLY, NO, YOU DO NOT ACT THIS WAY

UNLESS YOU DO HAVE A MENTAL CONDITION, YOU DO HAVE A MENTAL ILLNESS. AND IF YOU HAVE ANY DOUBT ABOUT IT, IF THERE'S ANY DOUBT ABOUT IT AT ALL IN YOUR MINDS, YOU MUST RESOLVE THAT DOUBT IN THE FAVOR OF JONATHAN SIMMONS. THAT'S THE LAW AS HIS HONOR WILL CHARGE YOU.

LADIES AND GENTLEMEN, THE PLACES I WAS RAISED AND THE PLACES I GO WHEN SOMEBODY IS SICK, YOU TREAT THEM. WHEN SOMEBODY'S INTELLIGENCE IS BORDERLINE AND IT MAKES THEM UNABLE TO COPE WITH THEIR SICKNESS, YOU DON'T CONDEMN THEM TO DEATH. AND WHEN SOMEBODY FROM THE TIME THEY WERE THAT SIZE WAS KNOWN TO THEIR FAMILY TO HAVE MENTAL PROBLEMS AND NOT BE ABLE TO FUNCTION PROPERLY IN SOCIETY AND THAT FAMILY NEVER CAME TO GIVE HIM ANY ASSISTANCE, YOU DON'T CONDEMN THOSE TYPE OF PEOPLE TO DEATH.

PLEASE, LADIES AND GENTLEMEN OF THE JURY, MR. FOREMAN, RETURN A VERDICT OF INCARCERATION FOR LIFE FOR [Tr. 2076] JONATHAN DALE SIMMONS.

THE COURT: MRS. JENNIFER KNEECE SHEALY.

MRS. SHEALY: MAY IT PLEASE THE COURT? MR. FOREMAN, LADIES AND GENTLEMEN OF THE JURY, AS I STAND BEFORE YOU TODAY TO ASK FOR A YOUNG MAN'S LIFE, I AM SCARED TO DEATH. MY HEART IS IN MY THROAT. AND I LOOK OUT AT EACH OF YOU WHOSE FACES HAVE BECOME SO

FAMILIAR. MOST OF YOU ARE THE ONE I QUESTIONED WHEN WE WENT THROUGH THE SELECTION PROCESS AND I REALIZE TODAY YOU ARE GONG TO BE ASKED TO MAKE THE MOST IMPORTANT DECISION OF YOUR LIFE BECAUSE IF YOU DECIDE THAT JONATHAN SIMMONS LIVES, HE LIVES; AND IF YOU DECIDE THAT JONATHAN SIMMONS DIES, HE DIES.

MR. HARPOOTLIAN HELD UP THE BIBLE AND REMINDED YOU THAT YOU EACH SAID THAT YOU COULD GIVE DEATH IN THE PROPER CIRCUMSTANCES. BUT I ASK YOU TO REMEMBER THAT YOU ALSO SAID YOU WOULD CONSIDER MITIGATING CIRCUMSTANCES IN MAKING THAT DECISION AND THAT IS WHAT MR. BUNCH HAS REMINDED YOU OF JUST A MINUTE AGO AND THAT IS WHAT I ASK YOU TO THINK ABOUT AS WELL. EVERY CASE WHERE SOMEONE IS CONVICTED OF MURDER WITH AN AGGRAVATING CIRCUMSTANCE IS NOT A PROPER CASE FOR A DEATH PENALTY. THAT DECISION IS LEFT UP TO THE JURY. TO EACH OF YOU. YOU EACH MUST CALL UPON YOUR CONSCIENCE AND YOUR HEART IN MAKING THAT DECISION. AND I ASK THAT YOU RECALL ALL OF THE TESTIMONY THAT WE [Tr. 2077] PRESENTED YESTERDAY AND THAT YOU CONSIDER THAT. YOU HEARD ABOUT THE SIMMONS FAMILY. YOU HEARD ABOUT FROM THE TIME THAT JONATHAN SIMMONS WAS AN INFANT, HE WAS BEATEN BY HIS FATHER. HE WAS NEVER LOVED BY HIS FATHER. MR. HARPOOTLIAN TRIES TO DISMISS THAT. HOW CAN YOU DISMISS THAT? ON FATHER'S DAY I THOUGHT OF JONATHAN

SIMMONS. MY HUSBAND GAVE THE CHILDREN'S SERMON AT OUR CHURCH AND WITH THE LITTLE CHILDREN PRESENT, HE BROUGHT DOWN THINGS TO SHOW THEM THAT REMINDED HIM OF HIS FATHER. A RAKE, A BAT, A GLOVE, SOME TOOLS AND A FISHING – FISHING – STICK. AND HE TOLD THE LITTLE CHILDREN OF THE CHURCH AND THE CONGREGATION THAT HIS FATHER TAUGHT HIM TO PLAY BALL AND HIS FATHER PLAYED CATCH AND THEY WENT FISHING. AND HE TAUGHT HIM TO BUILD THINGS. JONATHAN SIMMONS' FATHER DIDN'T TEACH HIM ANY OF THOSE THINGS. WHAT WOULD JONATHAN SIMMONS SHOW YOU? A COMB? A SWITCH? A LEMON? A FAN BELT? AND MY HUSBAND ALSO SHOWED THE CHILDREN A BOX OF BAND-AIDS AND SAID WHEN HIS DADDY FOUND OUT HE WAS HURT, HE WOULD MEND HIM. JONATHAN SIMMONS' FATHER CAUSED THE NEED FOR THE BAND-AID AND SAID THAT WHEN HIS DADDY FOUND OUT HE WAS HURT, HE MENDED HIM. JOHNATHAN SIMMONS' FATHER CAUSED THE NEED FOR THE BAND-AIDS AND WOULDN'T LET HIM TO [sic] GO TO THE DOCTOR. YOU CANNOT FORGET THAT WHEN YOU GO BACK TO THE JURY ROOM.

THE ONE THING MY HUSBAND AND I WANT MORE THAN [Tr. 2078] ANYTHING IS CHILDREN. CHILDREN TO LOVE, TO HUG, TO NURTURE. JONATHAN SIMMONS' FATHER NEVER DID THAT TO HIM. YOU HEARD THE TESTIMONY OF ROBIN. YOU HEARD THE TESTIMONY OF BARBARA AND OF WILLIE. THERE WAS NO LOVE IN THAT HOME ON THE PART OF THE FATHER. HE WAS ABUSIVE. HE

BEAT THEM. HE TOOK THEM NOWHERE. THAT FAMILY PLAYED NO GAMES BUT THEY PLAYED HIDE. THEY PLAYED HIDE FROM DADDY WHEN HE COMES HOME FROM WORK. THEY PLAYED HIDE THE WAY OUR FAMILY IS FROM EVERYBODY ELSE. AND DR. EVANS AND MR. BOYLE EXPLAINED TO YOU JONATHAN'S BEEN PLAYING HIDE FOR YEARS. YOU MUST CONSIDER THAT. AND AMMIE MURRAY AND ELLOISE DOYLE AND TOME TURNIPSEED, THEIR TESTIMONY IS VERY IMPORTANT BECAUSE THEY SAW JONATHAN. THEY ARE NON-FAMILY MEMBERS AND THEY SAW JONATHAN AND THEY KNOW THAT HE HAS THE ABILITY TO BE KIND, TO BE GENTLE, TO HELP A CHURCH THAT HAD BEEN RUINED AND THEY THOUGHT ENOUGH OF HIM THEN TO COME INTO COURT YESTERDAY AND ASK YOU FOR MERCY.

MR. HARPOOTLIAN WANT TO FOCUS ALL OF YOUR ATTENTION ON THE AGGRAVATION PART OF THIS SECOND PART OF THE TRIAL, BUT THAT'S NOT PROPER. YOU MUST CONSIDER THE MITIGATION. YOU MUST CONSIDER THE PEOPLE WHO CAME IN HERE AND ASKED YOU FOR MERCY FOR JONATHAN. THEY ASKED YOU FOR MERCY.

AND MR. HARPOOTLIAN THINKS WE ARE TELLING YOU DON'T BLAME JONATHAN, DON'T BLAME JONATHAN. WE ARE NOT [Tr. 2079] ASKING YOU THAT. YOUR CHOICE IS IN WHAT WAY IS HE GOING TO BE PUNISHED. THAT IS YOUR CHOICE. NOT THAT HE WILL NOT BE PUNISHED. AND I WOULD SUBMIT TO YOU HE IS 22 YEARS-OLD. A LIFE SENTENCE IS PUNISHMENT.

IN ENGLAND, MANY YEARS AGO WHEN THE PEOPLE IN THE LANDS WOULD HEAR THE BELLS OF THE CHURCH RING, THEY TOLLED, THEY KNEW SOMEONE HAD DIED. AND AN ENGLISH PREACHER AND POET JOHN DONNE WHEN TALKING ABOUT THE EFFECTS OF DEATH ON EACH OF US WROTE EVERY MAN'S DEATH DIMINISHES ME BECAUSE I AM INVOLVED IN MANKIND. SO SAY NOT TO ASK ~~FOR~~ WHOM THE BELLS TOLL. THEY TOLD [sic] FOR THEE.

JONATHAN SIMMONS, IF YOU WERE TO DECIDE ON THE DEATH PENALTY, WILL DIE AND HIS DEATH WILL AFFECT MANY. I HAVE WORKED ON THIS CASE FOR MONTHS AND THERE IS NO QUESTION THAT THIS IS A SAD, SAD CASE. IT IS SAD FOR ALL OF THE VICTIMS AND ALL THEIR FAMILIES AND IT IS SAD FOR THE SIMMONS. AND WHAT YOU MUST REALIZE IS THAT NOTHING YOU WILL DO WILL BRING JOSIE LAMB BACK AND NOTHING YOU WILL DO WILL MEND THE VICTIMS. IT IS TIME FOR THE SUFFERING IN THIS CASE TO END.

AND IF YOU CHOOSE TO – A DEATH SENTENCE FOR JONATHAN SIMMONS, THE SUFFERING WILL CONTINUE. I ASK THAT WHEN YOU GO BACK INTO THE JURY ROOM THAT YOU THINK ABOUT BARBARA AND THINK ABOUT ROBIN AND THINK ABOUT WILLIE. THIS SITUATION REMINDS OF A RECENT QUOTATION I READ FROM THE [Tr. 2080] REVEREND CHARLES ALLEN WHO SAID WHEN SOMEONE SAYS A SITUATION OR A PERSON IS HOPELESS, THEY SLAM THE DOOR IN THE FACE OF

GOD. THE SUFFERING MUST END. THINK OF MICHAEL.

* * *

[THE COURT:] JURORS, PLEASE, PLEASE, PLEASE, GIVE ME YOU ATTENTION NOW AS I CHARGE YOU THE LAW.

THE DEFENDANT IN THIS TRIAL HAS NOT TESTIFIED. THIS IS HIS CONSTITUTIONAL RIGHT AND IT IS NOT A CIRCUMSTANCE THAT YOU CAN TAKE INTO CONSIDERATION OR EVEN ALLOW TO ENTER INTO YOUR DISCUSSION IN THE JURY ROOM.

UNDER THE CONSTITUTION OF SOUTH CAROLINA AND UNDER THE UNITED STATES CONSTITUTION, IT IS HIS [Tr. 2081] CONSTITUTIONAL RIGHT NOT TO TESTIFY. THE FACT THAT THE DEFENDANT DID NOT TAKE THE WITNESS STAND AND TESTIFY IN HIS OWN BEHALF DOES NOT CREATE ANY INFERENCE AGAINST HIM. THE JURY MUST NOT PERMIT THAT FACT TO WEIGH IN THE SLIGHTEST DEGREE AGAINST THIS DEFENDANT. NOR SHOULD THIS FACT ENTER INTO THE DISCUSSION OR DELIBERATION OF THE JURY. I REPEAT AGAIN, THIS IS A CONSTITUTIONAL MATTER. NO JUROR SHOULD MAKE ANY COMMENT UPON THAT MATTER IN THE JURY ROOM.

THE COURT GENERALLY DETERMINES THE ADMISSIBILITY OF EVIDENCE. I INSTRUCT YOU THAT AS REGARDS ANY ALLEGED STATEMENT MADE BY THE DEFENDANT, THAT YOU, MEMBERS

OF THE JURY, MAKE THE ULTIMATE DETERMINATION OF WHETHER OR NOT THE DEFENDANT MADE THE SAID STATEMENT AND, IF HE DID MAKE THE STATEMENT, WHETHER THE STATEMENT WAS MADE BY THE DEFENDANT VOLUNTARILY AND OF HIS OWN FREE WILL AND ACCORD. AND FINALLY, JUST WHAT WEIGHT, IF ANY, SHOULD BE GIVEN TO ANY STATEMENT MADE BY THE DEFENDANT.

I CHARGE YOU THAT YOU MUST DETERMINE IF THE ALLEGED STATEMENT WAS THE PRODUCT OF AN ESSENTIALLY FREE AND UNCONSTRAINED CHOICE BY ITS MAKER. IF YOU DETERMINE IT WAS AND THE BURDEN IS UPON THE STATE TO PROVE THIS FACT AS ALL OTHER FACTS BEYOND A REASONABLE DOUBT, THEN YOU MAY GIVE THE STATEMENT SUCH FURTHER CONSIDERATION AS YOU DEEM PROPER. IF YOU DETERMINE THE ALLEGED STATEMENT WAS NOT THE FREE AND VOLUNTARY-WILLED EXPRESSION OF THE DEFENDANT, THEN [Tr. 2082] YOU SHOULD NOT CONSIDER THE STATEMENT AT ALL.

IN DETERMINING WHETHER A DEFENDANT'S WILL WAS OVERCOME IN OBTAINING A STATEMENT YOU SHOULD CONSIDER THE CHARACTERISTICS OF THE ACCUSED AND THE DETAILS OF THE INTERROGATION REFERRED TO IN THE LAW AS THE TOTALITY OF THE CIRCUMSTANCES. SOME OF THE FACTORS THAT YOU MUST CONSIDER ARE: THE AGE OF THE DEFENDANT; HIS EDUCATION OR LACK THEREOF; HIS BACKGROUND AND ENVIRONMENT; HIS MENTAL ABILITY OR CAPACITY; HIS I. Q. OR INTELLIGENCE; THE ADVICE OR LACK THEREOF TO

THE ACCUSED OF HIS CONSTITUTIONAL RIGHTS INCLUDING BUT NOT LIMITED TO THE MIRANDA WARNINGS CONCERNING THE RIGHT TO REMAIN SILENT; THAT A STATEMENT COULD BE USED AGAINST HIM IN A COURT OF LAW; THE RIGHT TO HAVE A LAWYER. IF HE COULD NOT AFFORD A LAWYER, A LAWYER WOULD BE APPOINTED WITHOUT ANY COST TO HIM AND THAT HE COULD STOP MAKING A STATEMENT AT ANY TIME. OTHER FACTORS TO CONSIDER ARE THE PLACE AND LENGTH OF DETENTION AND THE NATURE OF THE QUESTIONING.

YOU, THE JURY, MUST CAREFULLY SCRUTINIZE ALL OF THE SURROUNDING CIRCUMSTANCES BEFORE YOU GIVE ANY WEIGHT TO ANY ALLEGED STATEMENT MADE BY THE DEFENDANT. YOU MUST BE SATISFIED BEYOND A REASONABLE DOUBT THAT THE STATEMENT WAS MADE BY THE ACCUSED UNINFLUENCED BY PROMISE OF REWARD, THREAT OF INJURY OR DIMINUTION OF HIS RIGHTS.

MR. FOREMAN AND MEMBERS OF THE JURY, THE [Tr. 2083] DEFENDANT, JONATHAN DALE SIMMONS, HAS BEEN FOUND GUILTY OF MURDER. IT IS YOUR DUTY AND RESPONSIBILITY TO DETERMINE WHAT SENTENCE YOU WILL IMPOSE UPON THE DEFENDANT FOR THE OFFENSE OF MURDER. YOU MUST NOW DECIDE WHETHER TO SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT OR TO DEATH WHICH IS, IN THIS STATE, BY ELECTROCUTION.

IN ARRIVING AT YOUR SENTENCE, YOU MUST CONSIDER ANY STATUTORY EXTENUATING OR MITIGATING CIRCUMSTANCES AND YOU MUST CONSIDER ANY EXTENUATING OR MITIGATING CIRCUMSTANCES OF ANY NATURE WHATSOEVER AS SHOWN BY THE EVIDENCE.

YOU MAY CONSIDER THE STATUTORY AGGRAVATING CIRCUMSTANCES WHICH IS PROVEN BY THE STATE BEYOND A REASONABLE DOUBT. I INSTRUCT YOU THAT IN ARRIVING AT YOUR DECISION, YOU MUST FIRST DETERMINE FROM THE EVIDENCE WHICH WAS OFFERED AT THE TRIAL AND DURING THE SENTENCING PROCEEDING WHETHER THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED BEYOND EVERY REASONABLE DOUBT AT THE TIME THE VICTIM IN THIS CASE WAS MURDERED.

WHAT DO I MEAN BY THE TERM STATUTORY AGGRAVATING CIRCUMSTANCE? MR. FOREMAN AND MEMBERS OF THE JURY, A STATUTORY AGGRAVATING CIRCUMSTANCE IS A FACT, AN INCIDENT A DETAIL OR AN OCCURRENCE WHICH THE GENERAL ASSEMBLY, THE LEGISLATURE OF THIS STATE, HAS DECLARED BY STATUTE WOULD MAKE WORSE, THAT IS, AGGRAVATE THE OFFENSE OF MURDER WHEN [Tr. 2084] THAT FACT, INCIDENT, DETAIL OR OCCURRENCE ACCOMPANIES AN ACT OF MURDER.

A STATUTORY AGGRAVATING CIRCUMSTANCE IS ONE RECOGNIZED BY THE STATUTE AS A CIRCUMSTANCE WHICH INCREASES THE ENORMITY OF THE

OFFENSE OR A CIRCUMSTANCE WHICH ADDS TO THE INJURIOUS CONSEQUENCES OF THE OFFENSE.

BEFORE YOU CAN IMPOSE THE DEATH SENTENCE UPON THE DEFENDANT, ALL TWELVE OF YOU MUST AGREE BEYOND EVERY REASONABLE DOUBT THAT THE EVIDENCE DISCLOSES THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE. UNLESS YOU, THE JURY, UNANIMOUSLY, ALL TWELVE FIND BEYOND A REASONABLE DOUBT THAT THE EVIDENCE DISCLOSES THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE, YOU CANNOT SENTENCE THE DEFENDANT TO DEATH.

WHAT STATUTORY AGGRAVATING CIRCUMSTANCE MAY YOU CONSIDER? WHAT STATUTORY AGGRAVATING CIRCUMSTANCE DOES THE STATE ALLEGE EXISTED HERE BEYOND EVERY REASONABLE DOUBT AT THE TIME THE MURDER WAS COMMITTED? THE STATUTORY AGGRAVATING CIRCUMSTANCE WHICH YOU MAY CONSIDER IN DETERMINING THE DEFENDANT'S SENTENCE IS BURGLARY IN THE FIRST DEGREE.

SECTION 17-11-311 OF THE CODE OF LAWS AS PASSED BY THE GENERAL ASSEMBLY PROVIDES, BURGLARY FIRST DEGREE: "A PERSON IS GUILTY OF BURGLARY IN THE FIRST DEGREE IF THE PERSON ENTERS A DWELLING WITHOUT CONSENT AND WITH INTENT TO [Tr. 2085] COMMIT A CRIME THEREIN AND EITHER, WHEN IN EFFECTING ENTRY OR WHILE IN THE DWELLING, CAUSES PHYSICAL

INJURY TO ANY PERSON OR THE ENTERING OR REMAINING OCCURS IN THE NIGHT TIME".

SECTION 16-11-310 PROVIDES, "DWELLING MEANS ITS DEFINITION FOUND IN SECTION 16-11-10 AND ALSO MEANS THE LIVING QUARTERS OF A BUILDING WHICH IS USED OR NORMALLY USED FOR SLEEPING, LIVING OR LODGING BY A PERSON".

SECTION 16-11-10 PROVIDES, "WITH RESPECT TO THE CRIME OF BURGLARY, ANY HOUSE IN WHICH THERE SLEEPS A PROPRIETOR OR A PERSON WHO LODGES THERE WITH A VIEW TO THE PROTECTION OF PROPERTY SHALL BE DEEMED A DWELLING HOUSE OF".

UNDER THE LAW, THE STATE MUST PROVE BEYOND A REASONABLE DOUBT, THESE FACTORS. THERE MUST BE AN ENTERING. THE STATE MUST PROVE THAT THERE WAS AN ENTERING. THAT IS, THE PERSON CHARGED ACTUALLY WENT INSIDE OF THE DWELLING. IT MUST BE A DWELLING HOUSE. I HAVE DEFINED FOR YOU THE STATUTORY PROVISIONS IN REGARD TO A DWELLING HOUSE. IT MUST BE EITHER IN THE NIGHTTIME OR THE DEFENDANT CAUSED PHYSICAL INJURY TO ANY PERSON. EITHER ONE IS SUFFICIENT. FINALLY, THERE MUST BE AN INTENT TO COMMIT A CRIME THEREIN WHETHER THE CRIME IS COMMITTED OR NOT.

I CHARGE YOU THAT THE MERE ENTERING INTO A DWELLING HOUSE IS NOT A VIOLATION OF THIS SECTION. IT IS [Tr. 2086] ONLY WHERE THERE IS AN ENTERING WITH THE INTENT TO COMMIT A CRIME THAT THE OFFENSE OF BURGLARY IS COMPLETE.

THE ENTRY MUST BE CARRIED OUT WITH THE INTENT TO COMMIT A CRIME. PROOF OF INTENT NECESSARILY RESTS ON INFERENCE FROM CONDUCT. TO CONSTITUTE BURGLARY IN THE FIRST DEGREE, THE ENTERING MUST BE WITH THE INTENT TO COMMIT A CRIME THEREIN AND IT IS ESSENTIAL THAT THE FELONIOUS INTENT EXIST AT THE TIME OF THE ENTERING AND IT IS NOT SUFFICIENT THAT THE FELONIOUS INTENT IS FORMED AFTER THE ENTRY.

IN THIS CASE, THE STATE HAS PRESENTED EVIDENCE OF OTHER CRIMES. PLEASE, PLEASE, GIVE ME YOUR ATTENTION. THESE CRIMES MAY NOT BE USED TO PROVE A STATUTORY AGGRAVATING CIRCUMSTANCES [sic]. THESE CRIMES MAY NOT BE USED TO PROVE A STATUTORY AGGRAVATING CIRCUMSTANCE.

I CHARGE YOU THAT THE EVIDENCE OF OTHER CRIMES, THESE OTHER OFFENSES, SHOULD NOT BE CONSIDERED AS SUBSTANTIVE EVIDENCE OF A [sic] AGGRAVATING CIRCUMSTANCE. BUT IF YOU ARE CONVINCED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT COMMITTED THESE OTHER CRIMES OR THESE OTHER OFFENSES OR ANY OF THEM, YOU MAY CONSIDER THESE CRIMES OR OTHER OFFENSES AS EVIDENCE OF THE DEFENDANT'S CHARACTER AND HIS CHARACTERISTICS AS THEY MAY BEAR LOGICAL RELEVANCE TO THE CRIME. THESE MAY BE CONSIDERED ALONG WITH ALL OF THE OTHER EVIDENCE AND YOU MAY GIVE THEM WHATEVER WEIGHT YOU DEEM PROPER UNDER THE CIRCUMSTANCES OF THIS CASE.

[Tr. 2087] THE STATUTORY AGGRAVATING CIRCUMSTANCE WHICH YOU ARE AUTHORIZED TO CONSIDER IN THIS CASE HAS BEEN TYPED ON A SHEET OF PAPER THAT I HOLD IN MY HAND. IT IS ENTITLED STATUTORY INSTRUCTIONS. YOU WILL HAVE THAT DOCUMENT WITH YOU IN THE JURY ROOM IN YOUR DELIBERATIONS. IT IS SIGNED BY THIS COURT UNDER THE LAW. IN THE EVENT, THEREFORE, THAT YOU UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED AT THE TIME THE VICTIM IN THIS CASE WAS MURDERED, THEN YOU WOULD BE AUTHORIZED TO IMPOSE THE DEATH SENTENCE UPON THE DEFENDANT. SHOULD YOU DETERMINE THAT THE IDENTIFIED STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED AT THE TIME THE MURDER WAS COMMITTED AND SHOULD YOU UNANIMOUSLY DECIDE THAT THE SENTENCE OF DEATH BE IMPOSED UPON THE DEFENDANT, THEN YOU ARE REQUIRED TO SPECIFY IN WRITING IN YOUR VERDICT FORM THE STATUTORY AGGRAVATING CIRCUMSTANCE THAT YOU FOUND TO EXIST BEYOND EVERY REASONABLE DOUBT.

PLEASE NOTE THAT IN THE FORM OF SENTENCE, THERE IS A SPACE PROVIDED. IF YOU SO FIND THAT THERE WAS A STATUTORY AGGRAVATING CIRCUMSTANCE, THERE IS A SPACE PROVIDED WHERE YOU WILL WRITE OUT THAT YOU FOUND THE STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND EVERY REASONABLE DOUBT.

AGAIN, AS TO THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE, SHOULD YOU NOT FIND BEYOND EVERY REASONABLE [Tr. 2088] DOUBT THAT THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED AT THE TIME THE MURDER IN THIS CASE OCCURRED, THEN YOU WOULD NOT BE AUTHORIZED TO IMPOSE THE DEATH SENTENCE AND IN THAT EVENT, YOUR SENTENCE MUST BE LIFE IMPRISONMENT. FOR THAT MATTER, YOU CAN DECIDE THAT THE DEFENDANT BE SENTENCED TO LIFE IMPRISONMENT EVEN IF YOU UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED AT THE TIME THAT THE MURDER IN THIS CASE WAS COMMITTED.

IN ADDITION TO CONSIDERING THE STATUTORY AGGRAVATING CIRCUMSTANCE, YOU ARE REQUIRED BY THE LAW TO CONSIDER ANY STATUTORY MITIGATING CIRCUMSTANCES.

WHAT IS A STATUTORY MITIGATING CIRCUMSTANCE? A STATUTORY MITIGATING CIRCUMSTANCE IS A FACT, A DETAIL, AN INCIDENT OR AN OCCURRENCE WHICH THE GENERAL ASSEMBLY, THE LEGISLATURE OF THIS STATE HAS DECLARED BY STATUTE WOULD RENDER LESS SEVERE, THAT IS, MITIGATE THE OFFENSE OF MURDER WHEN THAT FACT, DETAIL, INCIDENT OR OCCURRENCE ACCOMPANIES THE ACT OF MURDER. A STATUTORY MITIGATING CIRCUMSTANCE IS ONE RECOGNIZED BY STATUTE, BY THE LAW AS A CIRCUMSTANCE WHICH IN FAIRNESS AND MERCY MAY BE CONSIDERED AS EXTENUATING OR AS REDUCING THE DEGREE OF

MORAL CULPABILITY FOR THE COMMISSION OF THE ACT OF MURDER. THE MITIGATING CIRCUMSTANCE THAT SHOULD BE NOTED WOULD NOT CONSTITUTE EITHER JUSTIFICATION OR EXCUSE FOR THE OFFENSE IN QUESTION. [Tr. 2089] SUCH A CIRCUMSTANCE WOULD SIMPLY LESSON [sic] ONE'S GUILT. THAT IS MAKE HIM LESS BLAMEWORTHY OR LESS CULPABLE. YOU ARE REQUIRED TO CONSIDER ANY MITIGATING CIRCUMSTANCE REGARDLESS OF WHETHER IT IS A STATUTORY MITIGATING CIRCUMSTANCE OF ANY NATURE THAT IS SUPPORTED BY THE EVIDENCE IN ADDITION TO THE STATUTORY MITIGATING CIRCUMSTANCES. BY THIS I MEAN THAT THE JURY IS REQUIRED UNDER THE LAW TO CONSIDER NOT ONLY STATUTORY MITIGATING CIRCUMSTANCES BUT ANY MITIGATING CIRCUMSTANCES OF ANY NATURE WHATSOEVER SUPPORTED BY THE EVIDENCE.

WHAT IS A GENERAL OR NON-STATUTORY MITIGATING CIRCUMSTANCE? IT IS CIRCUMSTANCE RECOGNIZED AS ONE WHICH, IN FAIRNESS AND MERCY, MAY BE CONSIDERED TO BE EXTENUATING. A MITIGATING CIRCUMSTANCE IS NEITHER JUSTIFICATION OR EXCUSE FOR THE MURDER. IT SIMPLY LESSENS THE SEVERITY OF THE PUNISHMENT BECAUSE OF ITS EXISTENCE. YOU ARE REQUIRED TO CONSIDER ANY CIRCUMSTANCE OF ANY NATURE WHATSOEVER RELATING TO THE CASE OR TO THE DEFENDANT, JONATHAN DALE SIMMONS, AS A REASON FOR NOT IMPOSING THE DEATH SENTENCE. ANY FACTOR MAY BE TAKEN INTO

ACCOUNT AS A REASON FOR NOT IMPOSING THE DEATH SENTENCE ON THE DEFENDANT.

I CHARGE YOU THAT YOU MAY NOT CONSIDER THE STATUTORY AGGRAVATING CIRCUMSTANCE ALLEGED BY THE STATE UNLESS ALL TWELVE OF YOU HAVE FOUND THAT THIS STATUTORY AGGRAVATING CIRCUMSTANCE HAS BEEN PROVEN BEYOND A [Tr. 2090] REASONABLE DOUBT. THE SAME IS NOT TRUE, HOWEVER FOR A MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES.

IN THE CASE OF A MITIGATING CIRCUMSTANCE OR MITIGATING CIRCUMSTANCES YOU NEED NOT UNANIMOUSLY AGREE ON THE EXISTENCE OF A MITIGATING CIRCUMSTANCE OR MITIGATING CIRCUMSTANCES. NOR MUST THE DEFENDANT PROVE ANY MITIGATING CIRCUMSTANCE BEFORE YOU MAY CONSIDER IT. RATHER, EACH MEMBER OF THE JURY MAY CONSIDER ANY MITIGATING CIRCUMSTANCE OR MITIGATING CIRCUMSTANCES WHICH HE OR SHE FEELS TO BE SUPPORTED BY THE EVIDENCE. BEFORE YOU CAN IMPOSE A LIFE SENTENCE, IT IS NOT NECESSARY – I REPEAT, IT IS NOT NECESSARY FOR YOU TO FIND THE EXISTENCE OF ANY STATUTORY MITIGATING CIRCUMSTANCE OR ANY NON-STATUTORY MITIGATING CIRCUMSTANCE OF ANY NATURE. THERE IS NO BURDEN UPON THE DEFENDANT TO PROVE A MITIGATING CIRCUMSTANCE OR MITIGATING CIRCUMSTANCES. BUT, RATHER, THE BURDEN IS UPON THE STATE TO PROVE THE AGGRAVATING CIRCUMSTANCE BEYOND EVERY REASONABLE DOUBT. THE BURDEN IS UPON THE JURY TO CONSIDER THE EVIDENCE

SUBMITTED AND DETERMINE WHETHER THE MITIGATING FACTOR OR FACTORS EXIST AND, IF SO, THE SIGNIFICANCE AND WEIGHT TO BE ACCORDED IT. I REPEAT AGAIN, FOR THE SAKE OF EMPHASIS AND CLARITY, THERE IS NO BURDEN UPON THE DEFENDANT TO PROVE A MITIGATING CIRCUMSTANCE OR MITIGATING CIRCUMSTANCES. WHILE IT IS NECESSARY FOR YOU TO FIND, BEYOND EVERY REASONABLE DOUBT, THE EXISTENCE OF THE ALLEGED [Tr. 2091] STATUTORY AGGRAVATING CIRCUMSTANCE BEFORE YOU CAN SENTENCE TO DEATH, IT IS NOT REQUIRED THAT YOU FIND THE EXISTENCE OF ANY STATUTORY MITIGATING CIRCUMSTANCE OR ANY MITIGATING CIRCUMSTANCE OF ANY NATURE IN ORDER TO DECIDE THAT THE DEFENDANT BE GIVEN LIFE IMPRISONMENT.

AS A MATTER OF FACT, YOU MAY DECIDE THAT THE DEFENDANT RECEIVE A LIFE SENTENCE IRRESPECTIVE OF WHETHER YOU FIND THE EXISTENCE IN THE EVIDENCE OF A STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCE OR NOT. YOU MAY CHOOSE TO IMPOSE LIFE IMPRISONMENT AS AN ACT OF MERCY. AS I SAY, HOWEVER, YOU MAY IMPOSE A LIFE SENTENCE WITHOUT FINDING THE EXISTENCE OF A STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCE. AND YOU MAY GIVE A LIFE SENTENCE EVEN SHOULD YOU FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE. SHOULD YOU NOT UNANIMOUSLY FIND,

BEYOND EVERY REASONABLE DOUBT, THE EXISTENCE IN THE RECORD OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE, YOUR SENTENCE WOULD BE LIFE IMPRISONMENT EVEN THOUGH THERE IS NO PROOF IN THE RECORD OF AN ALLEGED STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCE.

UNDER THE LAW AND UNDER THE CONSTITUTION, YOUR DECISION MUST BE UNANIMOUS. UNDER THE CONSTITUTION AND UNDER THE LAW, YOUR DECISION MUST BE UNANIMOUS. YOUR DECISION TO SENTENCE TO LIFE IMPRISONMENT MUST BE [Tr. 2092] UNANIMOUS. YOUR DECISION TO SENTENCE TO DEATH MUST BE UNANIMOUS. UNANIMITY IS MANDATED UNDER THE CONSTITUTION AND THE STATUTORY LAW OF THE STATE.

WHAT STATUTORY MITIGATING CIRCUMSTANCES MAY YOU PROPERLY CONSIDER HERE? WHAT STATUTORY MITIGATING CIRCUMSTANCES DOES THE DEFENDANT ALLEGE INVOLVED IN THE CASE? THE STATUTORY MITIGATING CIRCUMSTANCES THAT ARE INVOLVED HERE IN THIS CASE ARE AS FOLLOWS: THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF MENTAL OR EMOTIONAL DISTURBANCE. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED. THE AGE AND MENTALITY OF THE DEFENDANT AT THE TIME OF THE CRIME. THESE ARE STATUTORY MITIGATING CIRCUMSTANCES.

I HAVE HERETOFORE CHARGED YOU AND I REPEAT AGAIN FOR THE SAKE OF EMPHASIS, YOU ARE REQUIRED TO CONSIDER ANY MITIGATING CIRCUMSTANCE OF ANY NATURE, REGARDLESS OF WHETHER IT'S INCLUDED IN THE STATUTE, IF THE EVIDENCE PRESENTS THAT TO YOU. I REPEAT, AGAIN, YOU MUST CONSIDER ANY MITIGATING CIRCUMSTANCE OF ANY NATURE REGARDLESS OF WHETHER IT IS INCLUDED IN THE STATUTORY PRESENTATION.

I CHARGE YOU THAT IN THE EVENT YOU FIND THAT AN ALLEGED STATUTORY MITIGATING CIRCUMSTANCE EXISTED, IN FACT, AT THE TIME THE MURDER INVOLVED IN THIS CASE WAS COMMITTED, SUCH A FINDING WOULD NOT PRECLUDE YOU FROM ALSO FINDING, [Tr. 2093] BEYOND EVERY REASONABLE DOUBT, THE EXISTENCE AT THE TIME OF THE MURDER OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCES AND DECIDING THAT THE DEFENDANT BE SENTENCED TO DEATH. IN OTHER WORDS, THE EXISTENCE OF AN ALLEGED STATUTORY MITIGATING CIRCUMSTANCE IS NOT A BAR TO THE IMPOSITION OF THE DEATH SENTENCE. HOWEVER, PLEASE, PAY CLOSE ATTENTION, HOWEVER, THE NONEXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE IS A BAR TO THE IMPOSITION OF THE DEATH PENALTY.

REMEMBER YOU CANNOT IMPOSE A DEATH SENTENCE UNLESS YOU FIND, BEYOND EVERY REASONABLE DOUBT, THE EXISTENCE IN FACT OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE AT THE TIME OF THE MURDER. AS I HAVE

ALREADY INSTRUCTED YOU, YOU WILL WRITE OUT YOUR FINDING OF THE AGGRAVATING CIRCUMSTANCE FOUND, BEYOND A REASONABLE DOUBT, UNDER THE STATUTE. WHERE, AFTER CONSIDERING ALL THE EVIDENCE, YOU FIND, BEYOND EVERY REASONABLE DOUBT, THAT THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED AT THE TIME THE MURDER WAS COMMITTED, YOU MAY DECIDE THAT THE DEFENDANT BE SENTENCED TO DEATH EVEN SHOULD YOU ALSO FIND THAT THE ALLEGED STATUTORY MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES EXISTED AT THE TIME THE VICTIM WAS KILLED.

AN IMPORTANT FACTOR, AN ELEMENT THAT YOU MAY CONSIDER IF YOU SHOULD CONCLUDE THAT A STATUTORY AGGRAVATING CIRCUMSTANCE EXISTS IS WHETHER THE DEFENDANT [Tr. 2094] SHOULD BE SENTENCED TO LIFE IMPRISONMENT FOR ANY REASON OR NO REASON AT ALL. THIS IS WHAT IS CALLED IN THE LAW AS A FINDING OF MERCY AND IF SUCH SHOULD BE YOUR DECISION, YOU WILL INDICATE BY RETURNING TO THE COURT THE SENTENCE OF LIFE IMPRISONMENT IN THE CASE. YOU MUST KEEP IN MIND THAT A DECISION THAT THE DEFENDANT BE SENTENCED TO DEATH MUST BE UNANIMOUS AND A DECISION THAT THE DEFENDANT BE SENTENCED TO LIFE IMPRISONMENT MUST BE UNANIMOUS.

NOW, MEMBERS OF THE JURY, I GIVE TO YOU THE FORMS. PLEASE, PLEASE GIVE ME YOUR URGENT ATTENTION. MR. FOREMAN, PLEASE, LISTEN CAREFULLY NOW. YOU MUST SIGN THESE

FORMS ON BEHALF OF THE JURY. PLEASE, GIVE ME YOUR URGENT ATTENTION.

FIRST, I HAVE A SHEET CALLED STATUTORY INSTRUCTIONS. I HAVE SIGNED THIS AS THE PRESIDING JUDGE AND I SEND THAT IN TO YOU UNDER THE LAW. IT IDENTIFIES WHAT STATUTORY AGGRAVATING CIRCUMSTANCE THAT YOU MAY FOLLOW AND IT ALSO IDENTIFIES WHAT STATUTORY MITIGATING CIRCUMSTANCES THAT YOU MAY CONSIDER AND IT ALSO HAS THE LAST SENTENCE WHICH IS IN CAPS, YOU MAY ALSO CONSIDER ANY NON-STATUTORY MITIGATING CIRCUMSTANCES. THAT ONE SENTENCE SIMPLY MEANS THAT I EMPHASIZE TO YOU THAT I HAVE ALREADY COVERED MITIGATING CIRCUMSTANCES OF ANY NATURE MUST BE CONSIDERED. I SEND THAT INTO [sic] YOU. I HAVE SIGNED THAT. THAT'S A MATTER THAT I SEND IN UNDER THE LAW. YOU JUST [Tr. 2095] SIMPLY RECEIVE THAT FORM BECAUSE THE COURT HAS SIGNED THAT FORM. YOU MAY REFER TO THAT FORM FOR YOUR CONSIDERATION OF MATTERS IN THIS CASE.

NOW, THEN I HAVE A SHEET, MR. FOREMAN AND MEMBERS OF THE JURY. WE ALWAYS HAVE THE NAME OF THE CASE. WE CALL IT THE CAPTION IN THE LAW. IT SIMPLY IDENTIFIES THE STATE OF SOUTH CAROLINA VERSUS JONATHAN SIMMONS, DEFENDANT. NOW, ON THIS FORM, ON THE SIDE FROM THE CAPTION, IT READS: FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCES, IT READS: WE, THE JURY, IN THE ABOVE-ENTITLED CASE FIND, BEYOND A REASONABLE DOUBT, THE EXISTENCE OF

THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCES AND THEN THERE ARE SOME BLANK LINES, A PLACE FOR THE FOREMAN TO SIGN AND A PLACE TO DATE IT. YOU NEED TO DEAL WITH THIS FORM FIRST. UNLESS YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND EVERY REASONABLE DOUBT, YOU CANNOT GO ANY FURTHER. PLEASE DEAL WITH THIS FORM FIRST.

NOW, THE STATUTORY AGGRAVATING CIRCUMSTANCE THAT IS PRESENTED BY THE STATE IS BURGLARY IN THE FIRST DEGREE. DEAL WITH THIS FORM FIRST. THERE MUST BE A UNANIMOUS FINDING THAT THERE IS THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE, BEYOND EVERY REASONABLE DOUBT, AT THE TIME THE MURDER WAS COMMITTED. PLEASE DEAL WITH THAT FORM FIRST. THAT SHOULD BE YOUR FOCUS, INITIALLY, IN REGARD TO THIS MATTER. WAS THERE PROOF OF A STATUTORY [Tr. 2096] AGGRAVATING CIRCUMSTANCE, BEYOND EVERY REASONABLE DOUBT?

THEN YOU HAVE OTHER FORMS. THE FORM THAT I NOW HOLD IN MY RIGHT HAND IS A TWO-PAGE FORM, MR. FOREMAN AND MEMBERS OF THE JURY. IT'S TWO PAGES. IT HAS THE CAPTION OF THE CASE. THEN ON THE SIDE IT HAS FROM THE CAPTION, SENTENCE OF DEATH PENALTY. IT READS: WE, THE JURY, IN THE ABOVE ENTITLED CASE HAVING FOUND, BEYOND A REASONABLE DOUBT, THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE AND IF YOU FIND AN AGGRAVATING CIRCUMSTANCE, YOU MUST

WRITE IT IN HERE NOW. YOU MUST WRITE IT IN HERE IN ORDER TO GO FURTHER ON THIS FORM. NOW SENTENCE THE DEFENDANT, JONATHAN SIMMONS, TO DEATH. THEN THERE ARE TWELVE LINES. THE FIRST LINE IS IDENTIFIED AS THE FOREPERSON. THEN OTHER ELEVEN LINES ARE IDENTIFIED AS JUROR. ALL TWELVE JURORS MUST SIGN THIS FORM. ALL TWELVE JURORS MUST SIGN THIS FORM. YOU WILL THEN DATE IT, MR. FOREMAN, IF THIS IS USED BY THE JURY.

THE NEXT FORM HAS THE CAPTION OF THE CASE, THEN ON THE SIDE OF THE CAPTION IT SAYS SENTENCE OF LIFE IMPRISONMENT WITH FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCES. IT READS IN THE BODY: WE, THE JURY, IN THE ABOVE-ENTITLED CASE HAVING FOUND, BEYOND A REASONABLE DOUBT, THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE AND THEN IT'S A BLANK TO WRITE IT IN, NOW SENTENCE THE DEFENDANT, JONATHAN SIMMONS, TO LIFE [Tr. 2097] IMPRISONMENT. ONLY ONE LINE IS ON THIS FORM, MR. FOREMAN. YOU CAN SIGN THIS FORM ON BEHALF OF THE JURY PROVIDED IT IS UNANIMOUS. YOU CAN SIGN THIS FORM ON BEHALF OF THE JURY PROVIDED IT IS UNANIMOUS.

AND THEN THE FINAL FORM HAS THE CAPTION OF THE CASE. ACROSS FROM THE CAPTION IT SAYS SENTENCE OF LIFE IMPRISONMENT AND IT HAS ONLY ONE SENTENCE: WE, THE JURY, IN THE ABOVE-ENTITLED CASE SENTENCE THE DEFENDANT, JONATHAN SIMMONS, TO LIFE IMPRISONMENT. A PLACE FOR THE FOREPERSON TO SIGN IT, A

PLACE TO DATE IT. THE DIFFERENCE BETWEEN THIS LAST FORM AND THE FORM PRECEDING THAT, I EXPLAINED TO YOU, IS THAT THE LAST FORM IS A LIFE SENTENCE WITHOUT A FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCE. THE PRECEDING FORM WAS A LIFE SENTENCE WITH A FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCE.

NOW, MR. FOREMAN, MEMBERS OF THE JURY, IF YOU HAVE THE SLIGHTEST PROBLEM WITH THE FORMS, PLEASE, LET ME KNOW. I WILL SEND THE FORMS IN IN ORDER, MR. FOREMAN. I BELIEVE, THEY ARE SELF-EXPLANATORY, BUT IF YOU HAVE THE SLIGHTEST PROBLEM, I'M HERE TO HELP. I'M HERE TO HELP.

* * *

[Tr. 2105] (WHEREUPON, THE JURY BEGAN THEIR DELIBERATIONS AT 11:45 A.M.)

(RECESS.)

THE BAILIFF: COURT COME TO ORDER. ALL RISE, PLEASE. ALL RISE.

THE COURT: THANK YOU. PLEASE BE SEATED EVERYONE. I HAVE A BILLET-DOUX FROM THE JURY. IT IS "JUNE 30, 1991. JUDGE ANDERSON, DOES THE IMPOSITION OF A LIFE SENTENCE CARRY WITH IT THE POSSIBILITY OF PAROLE? JAMES E. WRIGHT, JURY FOREPERSON".

RIGHTS ARE RESERVED; RIGHTS ARE PROTECTED. THE COURT WILL NOW ENGAGE IN A CHARGE TO THE JURY. THIS NOTE IS MADE A PART OF THE RECORD IN THE CASE.

COURT'S 19.

(WHEREUPON, COURT'S NUMBER 19, JURY NOTE, MARKED FOR THE RECORD AT THIS TIME.)

BRING THE JURY OUT. NO WHISPERING OR TALKING NOW. LET'S COME TO ORDER, FOLK.

(WHEREUPON, THE JURY RETURNED TO THE COURTROOM WITH A QUESTION AT 1:15 P.M.)

THE BAILIFF: JURORS ALL PRESENT, YOUR HONOR.

[Tr. 2106] THE COURT: THANK YOU, MR. BAILIFF. MR. FOREMAN, I RECEIVED THE NOTE AND I RESPOND AS FOLLOWS: MR. FOREMAN AND MEMBERS OF THE JURY, PLEASE, PLEASE, GIVE ME YOUR ATTENTION. YOU ARE INSTRUCTED NOT TO CONSIDER PAROLE OR PAROLE ELIGIBILITY IN REACHING YOUR VERDICT. DO NOT CONSIDER PAROLE OR PAROLE ELIGIBILITY. THAT IS NOT A PROPER ISSUE FOR YOUR CONSIDERATION. THE TERMS LIFE IMPRISONMENT AND DEATH SENTENCE ARE TO BE UNDERSTOOD IN THEIR PLAN [sic] AND ORDINARY MEANING. THE TERMS LIFE IMPRISONMENT AND DEATH SENTENCE ARE TO BE UNDERSTOOD IN THEIR PLAIN AND ORDINARY MEANING.

THANK YOU VERY MUCH. PLEASE GO BACK TO YOUR JURY ROOM.

(WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT 1:18 P.M.)

THE COURT: YES.

THE SOLICITOR: NO ADDITIONS OR EXCEPTIONS, YOUR HONOR.

THE COURT: DEFENSE?

MR. QUINN: YOUR HONOR, I EXCEPT ON ALL THE GROUNDS WE'VE PREVIOUSLY STATED. WE JUST RENEW THAT OBJECTION.

THE COURT: LET THE RECORD SHOW THAT THE PREVIOUS GROUNDS PRESENTED BY THE DEFENDANT HAVE BEEN CONSIDERED AND THOSE GROUNDS ARE NOW PRESENTED BACK TO THE COURT WITH [Tr. 2107] SPECIFICITY. THE SAME GROUNDS ARE CONSIDERED; THE SAME RULING IS MADE. RIGHTS ARE RESERVED; RIGHTS ARE PROTECTED IN REGARD TO APPELLATE REVIEW. THANK YOU VERY MUCH, COUNSEL.

(RECESS.)

THE BAILIFF: COURT COME TO ORDER. ALL RISE. THE HONORABLE RALPH KING ANDERSON, JR., PRESIDING. ALL RISE.

THE COURT: THANK YOU. PLEASE BE SEATED.

LADIES AND GENTLEMEN, GIVE ME YOUR ATTENTION. NOW, WE HAVE BEEN NOTIFIED THAT THE JURY HAS REACHED A VERDICT. THIS VERDICT WILL BE TAKEN BY THE COURT. THE DUTY AND RESPONSIBILITY IMPOSED UPON THESE JURORS IS AWESOME. THIS GARGANTUAN TASK HAS NOW BEEN COMPLETED BY THEM. DO NOT REACT TO THE JURY VERDICT. PLEASE, DO NOT REACT TO THE

JURY VERDICT. IF YOU REACT TO THE JURY VERDICT, I AM GOING TO TAKE ACTION.

IF I HAD SOME STENTORIAN VOICE WHERE I COULD COMMUNICATE WITH MORE VIM AND VIGOR, I WOULD, BUT THE CONCLUSION IS SIMPLY THIS, DO NOT REACT.

NOW, LAWYERS FOR THE STATE, DO YOU NEED TO TAKE ANY FURTHER ACTION IN REGARD TO PARTIES YOU REPRESENT?

THE SOLICITOR: YOUR HONOR, WE HAVE RELATED TO EVERYONE IN THE COURT NOT TO EXHIBIT FACIALLY, HAND MOVEMENTS, SEAT MOVEMENTS. I BELIEVE THEY ARE CLEAR. I [Tr. 2108] THINK DEFENSE COUNSEL HAS DONE THE SAME THING –

THE COURT: THANK YOU, MR. SOLICITOR –

THE SOLICITOR: – WITH THEIR FOLKS –

MRS. SHEALY: WE HAVE, YOUR HONOR.

THE COURT: MRS. JENNIFER KNEECE SHEALY?

MRS. SHEALY: WE HAVE INSTRUCTED OUR FAMILY MEMBERS AS WELL.

THE COURT: ALL RIGHT. BRING THE JURY OUT.

(WHEREUPON THE JURY RETURNED TO THE COURTROOM WITH A VERDICT AT 1:43 P.M.)

THE BAILIFF: THE JURORS ALL PRESENT, YOUR HONOR.

THE COURT: THANK YOU, MR. BAILIFF. MS. CLERK, YOU ARE RECOGNIZED.

THE CLERK: MR. FOREMAN, HAVE YOU REACHED YOUR VERDICT?

THE FOREMAN: WE HAVE.

THE CLERK: HAND IT TO ME, PLEASE?

(WHEREUPON, THE VERDICT FROM IS HANDED TO THE CLERK AT THIS TIME.)

THE COURT: ALL RIGHT. INDICTMENT NUMBER 90-GS-40-5861, THE STATE VERSUS JONATHAN SIMMONS, FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCES: WE, THE JURY, IN THE ABOVE-ENTITLED CASE FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES: TO WIT, BURGLARY FIRST [Tr. 2109] AGREED [sic]. SIGNED JAMES E. WRIGHT, AS FOREMAN. JUNE 30, 1991.

INDICTMENT NUMBER 90-GS-40-5861, THE STATE VERSUS JONATHAN SIMMONS, WE, THE JURY, IN THE ABOVE-ENTITLED CASE HAVING FOUND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES: TO WIT, BURGLARY FIRST DEGREE, WE SENTENCE THE DEFENDANT, JONATHAN SIMMONS, TO DEATH. SIGNED JAMES E. WRIGHT AS FOREPERSON; CHARLES EZELL, JILL COOPER, TOLLIE ELDERS, CHARLES YELTON, STEPHEN SMITH, ALFREDIA CASH, CARTER JORDON, JACQUELYN MATTHEWS,

WILLIE GRIDINE, JUDY WICKER, AND ROBERT DOLE.
JUNE 30, 1991.

* * *

[Tr. 2322] COURT'S EXHIBIT 10

[Tr. 2323] **STATE OF SOUTH CAROLINA**)
) AFFIDAVIT
COUNTY OF RICHLAND)

Appeared before me Robert W. Oldendick, who being duly sworn deposes and says:

I am the Director of the Survey Research Laboratory of the University of South Carolina's Institute for Public Affairs, and have held that position since August, 1989. I hold a Ph.D. degree in political ccience [sic] from the University of Cincinnati, and have twenty years' experience in the area of public opinion survey research methodology.

Between June 17 and June 22, 1991, I conducted the public opinion survey summarized on the eight-page document attached hereto. I hereby attest to the truth of all matters set forth therein.

/s/ Robert W. Oldendick
ROBERT W. OLDENDICK

[Jurat omitted in printing]

[Tr. 2324] **SURVEY METHODOLOGY**

The respondents interviewed in this study represent a random sample of individuals age 18 and older, living in households with telephones in South Carolina. The

sample for this study was drawn by means of random-digit dialing (RDD). RDD is telephone interviewing coupled with the use of telephone numbers generated completely at random. In drawing this sample all the operating exchanges (area code plus three-digit prefixes) in the State of South Carolina were identified. From this list, one of the exchange numbers was randomly drawn and a second random number between 0000 and 9999 generated to complete the telephone number. This process was repeated until a sufficient quantity of telephone numbers had been created to provide 500 completed interviews. Within households, a respondent 18 years of age or older was randomly chosen to be interviewed by means of the last birthday method of respondent selection. In order that the sample would represent the potential juror pool, respondents were first asked whether they were either registered to vote in South Carolina or had a valid South Carolina driver's license; if a person did not meet either of these criteria, they were not interviewed.

The data collection was carried out by the professional interviewing staff of the Survey Research Laboratory of the University of South Carolina's Institute of Public Affairs. Prior to the actual interviewing, the interviewers and interviewing supervisors received specialized training for this survey. The interviewing was conducted from the Institute's offices on the University of South Carolina Columbia campus. Each interviewer was monitored to ensure that the questionnaire instructions were being followed. Interviews were conducted between June 17 and June 22, 1991. Calls were made from 9:00 AM to 9:30 PM Monday through Friday, and from 10:00 AM to 4:00 PM on Saturday.

In order to avoid biasing the sample in favor of those individuals that were most easily contacted, repeated attempts were made to contact those numbers that were [Tr. 2325] consistently not answered. Calls were made at different times of the day and on different days of the week in order to contact those individuals who may be away from home on a regular basis. In addition, households in which an interview was initially refused were recontacted, and an attempt made to gain cooperation.

A total of 504 completed interviews were conducted for this study. The response rate was 76.6%. In 95 out of 100 cases, the potential sampling error (error due to the fact that not all residents of the State were interviewed) is ± 4.4%.

The following tables provide the results of this survey. Tables 1 - 3 present the data for those people whose opinion concerning the death penalty depended upon the circumstances of the case; that is, they neither favored nor opposed the death penalty in all cases where a person is convicted of murder. Tables 4 - 6 provide this same information for all respondents.

[Tr. 2326] TABLE 1

POSSIBILITY OF RELEASE IF SENTENCED TO LIFE IMPRISONMENT

Question: "When a person is convicted for murder in South Carolina, they must be sentenced to life imprisonment or to the death penalty. If a person is sentenced to life imprisonment does this mean that they will have to spend the rest of their life in prison or can they be released from prison at some point in the future?"

Response	N	%
Will Have To Serve The Rest Of Their Life	82	20.0
Can Be Released At Some Point	293	71.6
Don't Know	34	8.3

[Tr. 2327] TABLE 2

AMOUNT OF TIME SPENT IN PRISON IF SENTENCED TO LIFE IMPRISONMENT

Question: "If you heard today that someone was sentenced by a court in South Carolina to life imprisonment for committing a murder, about how much time do you think they would have to spend in prison?"

Years	N	%
One	2	0.5
Two	3	0.7
Four	3	0.7
Five	3	0.7
Six	3	0.7
Seven	10	2.4
Eight	15	3.7
Nine	4	1.0
Ten	25	6.1
Eleven	8	2.0
Twelve	15	3.7
Thirteen	2	0.5
Fourteen	1	0.2
Fifteen	27	6.6
Eighteen	8	2.0

Twenty	58	14.2
Twenty-two	2	0.5
Twenty-five	15	3.7
Twenty-eight	3	0.7
Thirty	20	4.9
Thirty-two	1	0.2
Thirty-five	1	0.2
Thirty-eight	1	0.2
Forty	6	1.5
Forty-four	1	0.2
Forty-five	1	0.2
Fifty	2	0.5
Sixty	2	0.5
Eighty	1	0.2
Rest Of Their Life	29	7.1
Don't Know	137	33.5

(IF DON'T KNOW, PROBE: "Do you think it would be less than ten years, between ten and nineteen years, twenty to twenty-nine years, or thirty years, or more?"

Categories (All Responses)	N	%
Less Than Ten Years	64	15.6
Ten To Nineteen Years	131	32.0
Twenty To Twenty-Nine Years	101	24.7
Thirty Years Or More	61	14.9
Don't Know	23	5.6
Rest Of Their Life	29	7.1

[Tr. 2328] TABLE 3

IMPORTANCE OF KNOWING TIME BEFORE CHANCE OF RELEASE

Question: "As you may know, in South Carolina the jury normally decides whether to sentence a convicted murderer to life imprisonment or to the death penalty. If you were on a jury and had to make that decision, how important would it be for you to know how much time the person would have to spend in prison before they would have a chance to be released, if you sentenced them to life imprisonment . . . extremely important, very important, somewhat important, not too important, or not at all important?"

Response	N	%
Extremely Important	176	43.0
Very Important	137	33.5
Somewhat Important	42	10.3
Not Too Important	10	2.4
Not At All Important	18	4.4
Don't Know	26	6.4

[Tr. 2329] TABLE 4

POSSIBILITY OF RELEASE IF SENTENCED TO LIFE IMPRISONMENT

Question: "When a person is convicted for murder in South Carolina, they must be sentenced to life imprisonment or to the death penalty. If a person is sentenced to life imprisonment does this mean that they will have to spend the rest of their life in prison or can they be released from prison at some point in the future?"

Response	N	%
Will Have To Serve The Rest Of Their Life	102	20.2
Can Be Released At Some Point	358	71.0
Don't Know	44	8.7

[Tr. 2330] TABLE 5

AMOUNT OF TIME SPENT IN PRISON IF SENTENCED TO LIFE IMPRISONMENT

Question: "If you heard today that someone was sentenced by a court in South Carolina to life imprisonment for committing a murder, about how much time do you think they would have to spend in prison?"

Years	N	%
One	2	0.4
Two	3	0.6
Four	4	0.8
Five	3	0.6
Six	4	0.8

Seven	12	2.4
Eight	19	3.8
Nine	4	0.8
Ten	33	6.5
Eleven	10	2.0
Twelve	20	4.0
Thirteen	2	0.4
Fourteen	1	0.2
Fifteen	34	6.7
Eighteen	9	1.8
Twenty	70	13.9
Twenty-two	2	0.4
Twenty-five	18	3.6
Twenty-eight	3	0.6
Thirty	24	4.8
Thirty-two	1	0.2
Thirty-five	1	0.2
Thirty-eight	2	0.4
Forty	6	1.2
Forty-four	1	0.2
Forty-five	1	0.2
Fifty	2	0.4
Fifty-five	1	0.2
Sixty	3	0.6
Eighty	1	0.2
Rest Of Their Life	38	7.5
Don't Know	170	33.7

(IF DON'T KNOW, PROBE: "Do you think it would be less than ten years, between ten and nineteen years, twenty to twenty-nine years, or thirty years, or more?"

Categories (All Responses)	N	%
Less Than Ten Years	80	15.9

Ten To Nineteen Years	161	31.9
Twenty To Twenty-Nine Years	121	24.0
Thirty Years Or More	77	15.3
Don't Know	27	5.4
Rest Of Their Life	38	7.5

[Tr. 2331] TABLE 6

IMPORTANCE OF KNOWING TIME BEFORE CHANCE OF RELEASE

Question: "As you may know, in South Carolina the jury normally decides whether to sentence a convicted murderer to life imprisonment or to the death penalty. If you were on a jury and had to make that decision, how important would it be for you to know how much time the person would have to spend in prison before they would have a chance to be released, if you sentenced them to life imprisonment . . . extremely important, very important, somewhat important, not too important, or not at all important?"

Response	N	%
Extremely Important	231	45.8
Very Important	159	31.5
Somewhat Important	47	9.3

Not Too Important	12	2.4
Not At All Important	23	4.6
Don't Know	32	6.3

IN THE COURT OF GENERAL SESSIONS

[Tr. 2332] [Caption omitted in printing]

REQUEST TO CHARGE NO. 3
REQUESTED INSTRUCTION ON EFFECT OF JURY'S SENTENCING

The Defendant requests that the Court instruct the jury as follows:

I.

You will notice that I have used the word "recommendation" in referring to your decision on the question of what punishment the Defendant should receive. I have used this word because that is the word used in the statute itself. But it is important to understand that your decision as to sentence is really more than a "recommendation" as you or I might use that word in everyday speech. I tell you this because the law provides that whatever your "recommendation" is, I as the trial judge must accept it, and must sentence the Defendant accordingly. See *State v. Tyner*, 258 S.E.2d 559, *State v. Gilbert*, 258 S.E.2d 712 (1979).

II.

You should also understand that these sentences mean what they say. That is, if you recommend that the Defendant be sentenced to death, he actually will be put to death by electrocution. And if you recommend that the Defendant be sentenced to life imprisonment, [Tr. 2333] he actually will be sentenced to imprisonment in the State Penitentiary for the balance of his natural life, will not be

eligible for parole and will not "max out" his sentence. In short, he will spend the rest of his natural life in jail.

* * *

[Tr. 2334] COURT'S EXHIBIT # 17

DEFENDANT'S REQUEST TO CHARGE NO. A

Jury's Duty to Disregard Speculation
About alleged Deterrent

Effect of Death Sentence

The defendant, Jonathan Dale Simmons, respectfully requests that the Court instruct the jury as follows:

In deciding whether to impose a sentence of life imprisonment or death upon the defendant, Jonathan Dale Simmons, you are not to speculate on which, if either, of these sentences is more likely to deter other persons from committing similar crimes in the future.

There is no evidence before you as to whether the death penalty will deter crimes like the one in this case any more effectively than will life imprisonment. Therefore, you should disregard anything you may have heard one way or the other on this subject, and should set aside any preconceived opinions which you may hold as to whether life imprisonment or the death penalty is the more effective deterrent to murder. Such questions cannot be resolved in a trial such as this one. Therefore, they should play no role in your deliberations, and should not even be mentioned by you in the jury room. I instruct you that your sentencing decision must be based only on the evidence that has been presented in this case, pertaining

to the particular circumstances of this crime and the character and background of this defendant.

AUTHORITY:

State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), *cert denied,* 463 U.S. 1229 91983) (evidence concerning deterrent effect of death penalty inadmissible in capital sentencing or resentencing proceeding).

* * *

[Tr. 2339] DEFENDANT'S REQUEST TO CHARGE NO G

I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that he be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.

In your deliberations, you are not to speculate that these sentences mean anything other than what I have just told you, for what I have just told you is exactly what will happen to the defendant, depending on what your sentencing decision is.

S.C. Code Sec. 16-3-20
Caldwell v. Mississippi
State v. Atkins

* * *

[Tr. 2344] [COURT'S EXHIBIT 19] JUNE 30, 1991

JUDGE ANDERSON,

DOES THE IMPOSITION OF A LIFE SENTENCE CARRY WITH IT THE POSSIBILITY OF PAROLE?

S/ JAMES E. WRIGHT
JURY FOREPERSON

* * *

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jonathan Dale Simmons, Appellant.

Appeal From Richland County
Ralph King Anderson, Jr., Judge

Opinion No. 23784
Heard October 13, 1992 - Filed February 1, 1993

AFFIRMED

MOORE, A.J.: Appellant was convicted of murder, first degree burglary, and petit larceny. He was sentenced to death, a consecutive life term, and thirty days. We affirm.

FACTS

On July 17, 1990, the victim, Josie Lamb, was found dead in the bathroom of her home in the Olympia area of Columbia. Her skull had been crushed by an assailant who used the toilet tank lid to beat her on the head. Ms. Lamb was seventy-nine years old.

Appellant's fingerprint was found on the commode lid and his bloody footprint on the floor. He was arrested the next day and confessed to killing Ms. Lamb. He stated he went to her house "to see a white male named Jimmy,

redheaded, he owed me 50 dollars." He had been to Ms. Lamb's house and asked for Jimmy the previous week but when he touched the door handle Ms. Lamb screamed and he fled. On the night of the murder, he entered the home and heard her scream. After looking around to be sure no one else was present, appellant went into the bathroom and struck Ms. Lamb twice on the head with the commode lid. At some point he unplugged the telephone. He took a nightgown from a bedroom and fled.

At the guilt phase of trial, counsel conceded that appellant had in fact murdered Ms. Lamb and had taken the nightgown. Appellant's defense focused on the State's failure to prove first degree burglary which was the only statutory aggravating circumstance alleged in this case. He contended there was no evidence he intended to commit a crime at the time he entered Ms. Lamb's house since, as stated in his confession, he had gone there intending only to look for "Jimmy."

In response to appellant's trial strategy, the State was allowed to introduce under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), evidence of appellant's confessions to other crimes against three elderly female victims.

ISSUES

1. Whether the *Lyle* evidence was properly admitted?

2. Whether appellant was entitled to a penalty phase charge regarding his parole ineligibility?

3. Whether a charge regarding general deterrence should have been given?

4. Whether a charge describing each asserted nonstatutory mitigating circumstance should have been given?

DISCUSSION

GUILT PHASE

S.C. Code Ann. §16-11-311(A) (Supp. 1991) requires the State to prove as one element of first degree burglary that the defendant "entered a dwelling without consent and with intent to commit a crime therein." While such an intent is inferable from the defendant's conduct in the absence of other proof, *State v. Haney*, 257 S.C. 89, 184 S.E.2d 344 (1971), here the issue of intent was joined by evidence appellant had no intent to commit a crime when he entered Ms. Lamb's house. To prove intent, the Solicitor introduced the following three confessions given by appellant shortly after his arrest for Ms. Lamb's murder:

1. *Faris Mims*
   Ms. Mims is an elderly woman who lived in the Olympia area of Columbia at the time she was assaulted. In May 1990, appellant approached the front door of Ms. Mims house and asked for directions. He then went to her back door and forced his way in. He sexually assaulted her while choking her with some clothing around her neck. He stole $50 from the house. He admitted he chose the victim because he saw she was an "old lady."

2. *Marie Furtick*
   Ms. Furtick was seventy-one years old at the time she was assaulted by appellant in her home in the South Congaree area. In August 1989, appellant went to Ms. Furtick's front door and threw water on her when she opened the door. He then raped her, beat her and stole money.

3. *Estelle Simmons*
   Ms. Simmons is appellant's grandmother. She was seventy-one years old and lived near Ms. Furtick when, in June 1990, appellant raped and beat her in her home. He unplugged her telephone and looked for money.

The State introduced other evidence that both Ms. Furtick and Ms. Simmons were very severely beaten about the head and face. Ms. Furtick was bitten on the breast and buttocks. Although appellant's confessions indicate he took money from both Ms. Furtick and Ms. Simmons, the State's evidence indicates nothing of value was taken from either home.

Appellant argues that this evidence of other crimes should have been excluded because (1) these crimes were too dissimilar to the Lamb murder to be probative and (2) the prejudicial impact of this evidence was too great.

We find this evidence was properly admitted under *State v. Lyle* as evidence tending to establish intent. Clear and convincing evidence of other crimes that is logically relevant to prove intent is admissible under *State v. Lyle* if its probative value outweighs its undue prejudicial effect. *See State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990).

Although appellant asserts these other crimes are "too dissimilar" to be admitted under *State v. Lyle*, we find the evidence of other crimes is logically relevant to the issue of intent.

Evidence is relevant if it tends to make more or less probable some matter in issue upon which it directly or indirectly bears. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991); *State v. Bell, supra*. The evidence of appellant's violence against elderly women, each of whom was alone in her home at the time of the attack, makes more probable appellant's criminal intent when he entered Ms. Lamb's house since he already knew her to be an elderly woman. Although there was no sexual assault in Ms. Lamb's case, all of the previous sexual assaults were accompanied by terrific physical violence far beyond that need to accomplish the sexual assault itself. Moreover, theft was not the overwhelming motivation in these prior cases. It is logical to conclude from the evidence that appellant was chiefly motivated in each case by an intent to violently injure an elderly woman. This evidence is therefore relevant to the issue of appellant's intent at the time he entered Ms. Lamb's home without her consent.

Further, we find the probative value of this evidence outweighs its undue prejudicial effect. The issue of intent was a contested one. *Cf. State v. Garner*, 304 S.C. 220, 403 S.E.2d 631 (1991) (prejudicial effect of evidence of other crimes outweighs its probative value when purpose for which it is admitted is not a contested issue). The fact that appellant's grandmother was one of several elderly women he violently injured is probative because it demonstrates that even her status as his grandmother did not

negate his particular violent intent regarding elderly women.

We hold the evidence of other crimes was properly admitted under *State v. Lyle* as evidence tending to establish intent on the burglary charge in this case.

SENTENCING PHASE

At the sentencing phase of trial, appellant requested a charge that if sentenced to life imprisonment, he would be ineligible for parole under S.C. Code Ann. §24-21-640 (Supp. 1991).[1]

The trial judge ruled that *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), precluded any charge on parole eligibility or ineligibility. After the general sentencing charge was given, the jury posed a question to the judge: "Does the imposition of a life sentence carry with it the possibility of parole?" The trial judge then gave the "plain meaning" charge required under *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985), that the jury was not to consider "parole or parole eligibility" and the terms "life" and "death" are to be understood in their plain and ordinary meaning.

Appellant contends the trial judge erred in refusing his requested charge because *Torrence* did not settle this

---

[1] Section 24-21-640 provides:
The Board [of Probation, Parole and Pardon] must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in §16-1-60.

issue and failure to give the charge violates his due process and eighth amendment rights.

In *Torrence*, the defendant requested a charge that he would be ineligible for parole under §24-21-640 since he was already serving a life sentence for a previous murder. The trial judge denied the request but offered to charge that under S.C. Code Ann. §16-3-20 (Supp. 1991) the defendant would be eligible for parole only after twenty or thirty years depending upon whether an aggravating circumstance was found. This is the charge approved in *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302 (1987).

Justice Finney, writing for the majority, reversed Torrence's death sentence because "the trial judge committed prejudicial error in denying [his] request to charge based upon §24-21-640." 305 S.C. at 54. Justice Chandler concurred in result noting that the *Atkins* charge given under §16-3-20 was inaccurate in Torrence's case. He then overruled *Atkins* for a majority of the Court because (1) parole is not a proper consideration for a sentencing jury since it is not a mitigating circumstance and (2) practical problems may arise in the application of the parole statutes. Further, Justice Chandler's analysis relies on the proposition that the issue is solely a matter of state law under *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed. 2d 1171 (1983).

We need not engage in an academic discussion whether *Torrence* applies to both parole eligibility and ineligibility since we conclude the *Norris* charge given in this case satisfies in substance appellant's request for a charge on parole ineligibility.

In *State v. Davis*, ___ S.C. ___, 411 S.E.2d 220 (1991), we clarified that despite our ruling in *Torrence*, a defendant is still entitled, upon request, to a plain meaning charge under *State v. Atkins, supra*. Although the trial judge erroneously declined to give a plain meaning charge upon request in this case, the error was cured when he properly followed *State v. Norris, supra*, in answering the jury's question regarding the possibility of parole as follows:

> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean. *State v. Bell*, 305 S.C. 11, 406 S.E.2d 165 (1991); *State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699 (1989). We conclude a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole. We therefore find appellant's argument without merit.

Appellant further contends the trial judge erroneously denied his requested charge that the jury should disregard any alleged deterrent effect on others in deciding whether to impose life or death. The Solicitor, however, declined to argue general deterrence to the jury and specifically stated "all we are here to do is to deter [appellant]." Thus, general deterrence was never an issue presented to the jury. Moreover, we have previously held

the refusal to give such a charge is not error. *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984).

Finally, appellant argues the trial judge erred in denying his request that a detailed list of twenty-seven nonstatutory mitigating circumstances be submitted to the jury. Appellant concedes this procedure is not required so long as the jury is instructed, as it was here, to consider "any nonstatutory mitigating circumstances." *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981).

PROPORTIONALITY REVIEW

We have conducted the sentence review required by S.C. Code Ann. §16-3-25 (1985) and conclude the evidence supports the jury's finding of an aggravating circumstance. We find the death sentence was not arbitrarily imposed and is proportionate to the penalty in similar cases.

AFFIRMED.

HARWELL, C.J., TOAL, A.J., and Acting Associate Justice Bruce Littlejohn, concur. FINNEY, A.J., dissenting in separate opinion.

FINNEY, A.J. (Dissenting): I respectfully dissent. In my view, appellant was deprived of a fair trial by virtue of the erroneous admission of appellant's past crimes under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Further, I dissent from the majority's holding that appellant was not entitled to a jury charge to the effect that he would be ineligible for parole if sentenced to life in prison. I would reverse appellant's conviction and remand for a new trial.

Admission of Evidence Under State v. Lyle

At trial, the State introduced appellant's confessions to three past crimes involving the assault of elderly women for the purpose of showing that he entered the victims [sic] dwelling with the intent to commit a crime therein. In doing so, the State sought to satisfy the intent requirement of first degree burglary, S.C. Code Ann. § 16-11-311(A) (Supp. 1991). In my view, these past crimes do not meet the test of admissibility under *Lyle, supra,* inasmuch as they are factually dissimilar from the present case, or too remote in time, and in at least one instance, unduly prejudicial.

In order for evidence of other crimes to be admissible under the settled exceptions, the evidence must have "logical relevance to the particular excepted purpose for which it is sought to be introduced". *Lyle* at 807. Due to the very nature of such evidence and "the dangerous tendency and misleading probative force", its admission should be subject to rigid scrutiny by the courts. Should the court not clearly perceive logical relevance between the extraneous crime and the offense charged, the defendant should be given the benefit of the doubt and the evidence rejected. *Id. See also State v. Douglas*, 397 S.E.2d 98 (1990).

One prior incident on which evidence was admitted occurred more than one year prior to the offense for which appellant was on trial. I find this offense too remote in time to reasonably establish that because appellant entered this prior victim's dwelling with intent to commit a crime, he did so in the present case, or that there was a common scheme or plan. *Lyle* at 808.

Even if the evidence of past crimes is deemed relevant, it may nonetheless be excluded if the danger of unfair prejudice outweighs its probative value. *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987).

The state was permitted to introduce evidence of appellant's assault of his grandmother. I would hold that the prejudicial effect of this most egregious evidence was substantially outweighed by any probative value which may have been deduced therefrom. *Johnson, supra.*

Jury Charge On Parole Eligibility

Appellant contends the Circuit Court erred in declining to charge the jury that in the event he was sentenced to life in prison, he would be ineligible for parole under S.C. Code Ann. § 24-21-640. I agree.

Consistent with my opinion in *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), I believe that appellant was entitled to a jury charge under § 24-21-640 since he "sought only to have the court declare correct and current law relevant to his case". *Id.* at 320.

March 10, 1993

David I. Bruck, Esquire
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M. Anne Pearce
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Re: The State v. Jonathan Dale Simmons
Dear Ms. Pearce and Mr. Bruck:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing
denied.

s/David W. Harwell C.J.
s/Jean H. Toal A.J.
"I would grant. s/James E. Moore A.J.

s/Ernest A. Finney, Jr. A.J.
Associate Justice Chandler,
not participating

March 10, 1993."

* * *

SUPREME COURT OF THE UNITED STATES

No. 92-9059

Jonathan Dale Simmons,

Petitioner

v.

South Carolina

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of South Carolina.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that petition for writ of certiorari be, and the same is hereby, granted. The brief of the petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 5, 1994. Rule 29 does not apply.

October 4, 1993

No. 92-9059

(6)

Supreme Court, U.S.
FILED
NOV 16
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JONATHAN DALE SIMMONS,
Petitioner,

v.

SOUTH CAROLINA,
Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1.

IN THIS CAPITAL CASE, DID THE TRIAL COURT'S REFUSAL TO INFORM THE SENTENCING JURY THAT PETITIONER COULD NEVER BE PAROLED IF SENTENCED TO LIFE IMPRISONMENT VIOLATE HIS DUE PROCESS RIGHT TO REBUT THE PROSECUTION'S CASE FOR DEATH, WHERE THE STATE ARGUED THAT PETITIONER WOULD POSE A GRAVE RISK OF FUTURE VIOLENCE UNLESS HE WAS EXECUTED, AND WHERE THE JURY SPECIFICALLY ASKED ABOUT THE POSSIBILITY OF PAROLE?

2.

DOES THE EIGHTH AMENDMENT ENTITLE A CAPITAL DEFENDANT TO HAVE THE SENTENCING JURY INFORMED, AS A REASON NOT TO IMPOSE THE DEATH PENALTY, THAT UNDER STATE LAW THE JURY'S SENTENCING ALTERNATIVE OF "LIFE IMPRISONMENT" MEANS LIFE WITHOUT THE POSSIBILITY OF PAROLE?

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BRIEF FOR PETITIONER

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported as *State v. Simmons*, 427 S.E.2d 175 (S.C. 1993), and is reprinted in the Joint Appendix (hereinafter "J.A.") at 164-74. The order of the South Carolina Supreme Court denying rehearing is unreported, and is reprinted at J.A. 175.

JURISDICTION

The judgment of the South Carolina Court was entered on February 1, 1993. A timely petition for rehearing was denied on March 10, 1993. The petition for writ of certiorari was filed on June 8, 1993, and granted on October 4, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1275(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

2. It also involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part that no state may "deprive any person of life . . . without due process of law. . . ."

3. It also involves S.C. Code §§ 16-3-10 *et seq.* (1991 Supp.), which code sections are reprinted in the Appendix to the petition for writ of certiorari at A-8 through A-14.

4. It also involves S.C. Code § 24-21-640 (1991 Supp.), which provides in pertinent part:

> The [South Carolina] board [of probation, parole and pardon] must not grant parole, nor is parole au-

> thorized, to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60. Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense.

5. It also involves S.C. Code Ann. § 16-1-60 (1991 Supp.), which provides in pertinent part:

> For purposes of definition under South Carolina law a violent crime includes the offenses of murder, criminal sexual conduct in the first and second degree . . . [and] burglary in the first degree . . . .

STATEMENT OF THE CASE

Petitioner was indicted in a Richland County, South Carolina state court for the July 1990 beating death of an elderly woman, Ms. Josie Lamb, which occurred during a burglary at Ms. Lamb's home. Arrested the day after the murder, petitioner confessed to killing Ms. Lamb and also to a series of break-ins and sexual assaults against several other elderly women committed over a 14-month period. The week before his capital murder trial was to begin, petitioner pled guilty to first degree burglary and two counts of criminal sexual conduct in connection with two unrelated assaults on elderly women which occurred in August 1989 and June 1990. J.A. 9-13.

Under South Carolina law, these prior convictions for three violent offenses rendered petitioner ineligible for parole consideration in connection with any sentence imposed for any subsequent conviction for a violent offense —including the murder of Ms. Lamb. S.C. Code § 24-21-640 (1991 Supp.); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315, 320 (1991). South Carolina law authorizes only death and life imprisonment as punishments

for murder. S.C. Code Ann. § 16-3-20(A) (1991 Supp.). Therefore, the only noncapital sentence that petitioner could receive upon conviction for the murder charge was life imprisonment without possibility of parole.

From the very start of petitioner's trial, the prosecutor recognized the critical significance of petitioner's parole ineligibility in the determination of the sentence. Before the beginning of jury selection, he advised the trial judge that the state was "obviously . . . going to ask [the court] to exclude any mention of parole throughout this trial." J.A. 2. The prosecutor then moved for and obtained an order prohibiting the defense from asking prospective jurors any voir dire questions regarding the entire subject of parole. J.A. 2-7.[1] As a result of this ruling, defense counsel were not permitted to question prospective jurors as to whether they harbored fixed preconceptions about parole eligibility and the actual meaning of a "life" sentence under South Carolina law, or whether they could disregard any such preconceptions and be guided instead only by the instructions of the court.[2]

During both the guilt and sentencing phases of petitioner's trial, the state presented evidence tending to establish that the murder of Josie Lamb was one of a series of brutal attacks upon elderly women—including petitioner's own grandmother—that stretched over a 14-month period ending with petitioner's arrest the day after Ms. Lamb's death. At the sentencing phase, the defense responded

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[1] The trial court relied on *State v. Matthews*, 296 S.C. 379, 373 S.E.2d 587 (1988), *cert. denied*, 489 U.S. 1091 (1989), in which the South Carolina Supreme Court rejected a capital defendant's claim that he was constitutionally entitled to apprise the jury of restrictions on his eligibility for parole.

[2] The trial judge advised the prospective jurors in his introductory remarks that "[b]y death penalty, we mean death by electrocution." *State v. Simmons*, *supra*, Transcript of Record (hereinafter cited as "Tr.") at 157. At no point during the proceedings, however, did the judge (or anyone else) inform the jury that "life imprisonment" meant imprisonment for life without possibility of parole.

with mitigating evidence tending to show that petitioner's violent behavior stemmed from serious mental disorders, which were in part the product of many years of neglect and extreme sexual and physical abuse during his childhood and adolescence. J.A. 68-91.

Although the state disputed the reliability of much of the information underlying petitioner's claim of mental disorder, both the state's case for death and petitioner's case for life had in common the recognition that petitioner posed a severe and continuing danger to elderly women. Indeed, the prosecutor made petitioner's admitted dangerousness the core of the state's appeal for a death sentence. He argued that the jury's sentencing verdict "should be a response of society to someone who is a threat," J.A. 110, characterized the issue before the jury as "what to do with [petitioner] now that he is in our midst," *id.*, and repeatedly asserted that the jury's decision to sentence petitioner to death "will be an act of self-defense." J.A. 102, 110-12.

Petitioner's attempt to meet his "future dangerousness" line of attack consisted of two interrelated parts. First, he sought to show that his violent adult behavior was confined to attacks on elderly women, and that there was no reason to expect further acts of violence once he was isolated in a prison setting. J.A. 121. This was supported by the testimony of a number of witnesses who had known petitioner in the community prior to the crimes, and who generally indicated that they found violence to be out of character. Tr. 1685-86, 1694-95, 1941-43, 1945, 1947, 1950.

Second, petitioner introduced evidence tending to establish that he would make a well-behaved and nonviolent inmate if he was sentenced to life imprisonment.[3]

[3] South Carolina declared such "adaptability" evidence irrelevant and inadmissible in *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982), but has been required to admit it since this Court's decision in *Skipper v. South Carolina*, 476 U.S. 1 (1986).

This evidence included testimony from a female medical assistant and from two supervising officers at the Richland County jail to the effect that petitioner had adapted well to prison life during pretrial confinement. J.A. 92-95. In addition, petitioner offered expert opinion testimony from a clinical social worker and former correctional employee, Richard L. Boyle, who had both reviewed and observed petitioner's institutional adjustment. Mr. Boyle expressed the view, based on his assessment of petitioner's background and of his current functioning, that petitioner could and would successfully adapt to prison should he be sentenced to life imprisonment. J.A. 61-63.

In sum, petitioner's response to the state's future dangerousness argument was that he would not be dangerous so long as he was in prison. The effectiveness of this line of defense depended on the fact that petitioner was legally ineligible for parole and would therefore actually *remain* in prison if given a life sentence. Petitioner therefore asked the trial judge to so instruct the jury in accordance with S.C. Code § 24-21-640. J.A. 21-22; Defendant's Request to Charge No. 3, J.A. 160-61.

In support of his request for an accurate instruction on his parole ineligibility, petitioner proffered outside the presence of the jury evidence that he would not be considered for parole if the jury sentenced him to life imprisonment. Attorneys for the South Carolina Department of Corrections and the Department of Probation, Parole and Pardons confirmed for the court that any offender in petitioner's position was in fact ineligible for parole under South Carolina law. J.A. 10-21. The prosecutor did not question petitioner's ineligibility for parole. He did cross-examine the attorney for the Department of Corrections in an attempt to suggest that petitioner might receive holiday furloughs or other forms of early release. However, this cross-examination succeeded in establishing only that Department of Corrections regulations would further prohibit petitioner's release under

early-release programs such as work-release or supervised furloughs, and that no convicted murderer serving life without parole had ever been furloughed for any reason. J.A. 13-16.[4]

In addition, petitioner offered and the trial judge admitted without objection the results of a scientific statewide public opinion survey conducted by the University of South Carolina's Institute for Public Affairs a few days before petitioner's trial. This survey showed that only 7.1 percent of all jury-eligible[5] adults questioned firmly believed that a life-sentenced inmate would actually have to spend the rest of his life in prison.[6] Court's Exhibit 11, Table 2; J.A. 152-54. By contrast, nearly half of those surveyed believed that a convicted murderer sentenced to life imprisonment in South Carolina could expect to be

[4] The prosecutor did not attempt to explore the possible effect of gubernatorial commutation on life-without-parole inmates, since South Carolina is one of the few states that does not allow the governor to commute prison sentences. S.C. Const. art. IV, § 14 (1976) (commutation power extends to death sentences only); Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 Vanderbilt L. Rev. 529, 550 n.141 (1990) (listing South Carolina and Alabama as the only death penalty states where "a murderer [can] be put behind bars with no potential release mechanisms of any kind under a life-without-parole sentence"). *Cf. California v. Ramos*, 463 U.S. 992 (1983).

[5] To ensure that the sample was representative of potential jurors who were actually eligible to serve on capital juries, the poll ascertained whether each respondent's opinion concerning the death penalty depended upon the circumstances of individual cases. As a result, the sample was effectively "death-qualified" and "life-qualified" in a way roughly equivalent to the jury selection process in South Carolina capital trials. J.A. 150-52.

[6] When first asked whether life-sentenced inmates could be considered for release, 20 percent of the sample said no. Table 1, J.A. 152-53. However, when asked to specify how long a life-sentenced murderer would have to serve, only 7.1 percent gave "life." J.A. 154.

released from prison in less than twenty years; nearly three-quarters believed that release would occur after less than thirty years. *Id.* Finally, more than three-quarters of those surveyed stated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murderer would actually have to serve in prison would be an "extremely important" or "very important" factor in their own choice between life and death. Table 3, J.A. 155.

Based on this public opinion polling data and on the evidence already before the jury concerning petitioner's history of violent behavior outside of prison, petitioner argued that fear of his possible release on parole would likely influence the jury's deliberations unless the court gave an accurate instruction as to the unavailability of parole in petitioner's particular case. J.A. 34-38. The prosecutor continued to oppose such an instruction: after suggesting at one point that the court should "tell the jury [that] parole or the possibility thereof is none of your concern," he finally urged the court "not to allow . . . any argument by state or defense about parole and not charge the jury on anything concerning parole." J.A. 34-37. The trial judge ultimately adopted the prosecution's position and refused petitioner's requested instruction, citing the state supreme court's then-recent decision in *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). J.A. 39-45.[7]

Having failed in his efforts to have the trial judge provide the jury with accurate information concerning his ineligibility for parole, petitioner next requested that the judge give the following instruction:

[7] *Torrence*, decided just a month before petitioner's trial, overruled *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302 (1987), in which the South Carolina Supreme Court had instructed trial courts to charge on parole ineligibility when requested to do so by the defendant.

> I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that the defendant be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.
>
> In your deliberations, you are not to speculate that these sentences mean anything different from what I have just told you, for what I have told you is exactly what will happen to the defendant, depending on what your sentencing decision is.

Defendant's Request to Charge No. G, J.A. 162. The trial judge refused this instruction, but stated that he would give a somewhat similar instruction if and when the jury inquired about petitioner's parole eligibility. J.A. 45, 96.

Following these rulings, the prosecutor successfully moved to prohibit defense counsel from "making any representations to the jury as to what [a life] sentence may or may not mean." J.A. 57.[8] As a result, the defense arguments contained nothing from which the jury might have inferred that petitioner would be ineligible for parole if sentenced to life imprisonment.

Petitioner attempted unsuccessfully to obtain a parallel limitation of the prosecutor's jury argument. Asserting that the trial court's refusal of his requested parole instruction made it impossible for him to meet the state's

---

[8] The prosecutor based his motion upon *State v. Stewart*, in which South Carolina Supreme Court criticized a defense attorney for *inaccurately* assuring the jury that his client would "be in jail for his entire life" if sentenced to life imprisonment. 283 S.C. 104, 320 S.E.2d 447, 451 (1984). The *Stewart* court characterized defense counsel's assertion as "patently misleading and improper" because the defendant in that case would actually have been eligible for parole in 20 years.

future dangerousness claim, petitioner urged on the authority of *Gardner v. Florida*, 430 U.S. 349 (1977) that the prosecutor should be prohibited "from arguing or implying that the defendant will pose a risk of future violent behavior unless sentenced to death." J.A. 55-56. The trial judge denied petitioner's motion. He cautioned the prosecutor to confine his argument to the record, but he explicitly upheld "the right of the state to argue the defendant's dangerous propensity." J.A. 56-57. As noted earlier, the prosecutor made full use of this right in his penalty phase summation. He reminded the jury that even "[petitioner's] own psychologist, Dr. Evans, testified he is dangerous," J.A. 102, characterized the issue as what to do with petitioner "now that he is in our midst," J.A. 110, and repeatedly described the jury's decision for death as a simple matter of "self-defense." J.A. 110, 112.

After deliberating on petitioner's sentence for some 90 minutes, the jury sent out the following note:

> JUNE 30, 1991
>
> JUDGE ANDERSON,
>
> DOES THE IMPOSITION OF A LIFE SENTENCE CARRY WITH IT THE POSSIBILITY OF PAROLE?
>
> /s/ JAMES E. WRIGHT
> JURY FOREPERSON

J.A. 145, 163. The jury returned to the courtroom where, over petitioner's objection, the trial judge gave this instruction:

> Mr. Foreman, I received the note and I respond as follows: Mr. Foreman and members of the jury, please, please, give me your attention. You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your

> consideration. The terms of life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

J.A. 146. Twenty-five minutes after having its question about the parole answered in this fashion, the jury returned to the courtroom with a sentence of death. J.A. 148-50.

On appeal to the South Carolina Supreme Court, petitioner argued that concealment from the jury of his parole ineligibility violated the federal constitution in three separate ways. First, he contended that parole ineligibility was " 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death,' " *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986), (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)), and that he was therefore entitled to have the jury informed of his ineligibility under well-established Eighth Amendment principles. *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987). Second, relying on *Beck v. Alabama*, 447 U.S. 625 (1980), he asserted that by withholding from the jury the life-without-parole sentencing alternative that state law actually provided, the trial court had impermissibly diminished the reliability of the jury's determination that death was the appropriate punishment. And third, citing *Gardner v. Florida*, 430 U.S. 349 (1977), he argued that his due process right to rebut the state's affirmative case for death had been denied by the trial court's refusal to permit him to show that a noncapital sentence could adequately protect society from any future acts of violence by him.

The state court rejected petitioner's arguments and affirmed. The court began by noting its own prior decision in *State v. Torrence*, in which a majority of the court had concluded that parole was "not a mitigating circumstance" and that the issue of whether and what to charge capital sentencing juries on the subject was, under *California v. Ramos*, 463 U.S. 992 (1983), "solely a matter of state

law." *State v. Simmons*, 427 S.E.2d 175, 178 (S.C. 1993), J.A. 170. The state court then declined to further address petitioner's specific Eighth Amendment and due process claims. Instead, over Justice Finney's dissent, the court ruled that the trial judge's belated parole instruction, given in response to the jury's mid-deliberation inquiry, "satisfies in substance appellant's request for a charge on parole ineligibility." *Id.* at 179, J.A. 171. The state court did not disagree with petitioner's submission concerning the importance of his parole ineligiblity in the jury's sentencing deliberations. Nor did it hold that the first part of the trial judge's supplemental instruction—in which he admonished the jury not to consider parole or parole eligibility—actually sufficed to remove that issue from the case.[9] Rather, the state supreme court majority simply asserted that "a reasonable juror would have understood" the trial judge's "plain meaning" instruction as signifying "that life imprisonment indeed meant life without parole." *Id.* The state court denied rehearing by a four-to-one vote, J.A. 175, and this Court granted certiorari.

SUMMARY OF ARGUMENT

The state's case for the death penalty rested heavily on the claim that petitioner posed an unacceptable risk of violence in the future. For this reason, the trial court's refusal to inform the jury that its "life imprisonment" sentencing alternative would have rendered petitioner permanently ineligible for parole violated "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' " *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986) (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1979)). Petitioner did present evidence that he would probably prove to be nonviolent and co-operative *in prison*. But that evidence was an insuffi-

[9] Any such suggestion would have been contradicted by the state court's own precedent. *See infra*, at 18-19.

cient response to the state's future dangerousness claim unless the jury was also satisfied that he would actually *remain* in prison if sentenced to life imprisonment. The jury's mid-deliberation question about parole eligibility plainly showed the importance of this issue. South Carolina's no-parole statute for repeat violent offenders provided him with a powerful answer to the jury's understandable concern, and the trial judge should have granted petitioner's request to make that answer known to the jury.

The answer that the trial judge *did* give—that parole eligibility was "not a proper issue" for the jury's consideration, and that life imprisonment should be understood in its "plain and ordinary meaning"—fell far short of conveying that petitioner would in fact have been ineligible for parole if sentenced to life imprisonment. The admonition not to consider parole eligibility actually suggested that petitioner *would* be eligible for parole. In addition, empirical evidence in South Carolina and throughout the nation overwhelmingly shows that the "plain and ordinary meaning" of life imprisonment is imprisonment until release on parole. When the instruction is viewed in the context of the record as a whole—including the evidence and arguments, the jury's question about parole, and the swiftness with which a death sentence followed the judge's parole instruction—there exists at least a reasonable likelihood that the jury did not interpret the trial court's seemingly evasive answer to its very simple question about parole as signifying that petitioner would never be eligible for parole if the jury spared his life. *Boyde v. California*, 494 U.S. 370 (1990).

In addition to denying petitioner his due process right to rebut the state's case for death, the trial court's refusal to provide the sentencer with this crucial information about its noncapital sentencing alternative also violated two separate lines of this Court's Eighth Amendment jurisprudence. First, it impermissibly undermined the reliability of the jury's sentencing judgment by concealing

both the incapacitative and retributive effect of the noncapital punishment provided by state law. *California v. Ramos*, 463 U.S. 992 (1983); *Beck v. Alabama*, 447 U.S. 625 (1980). And second, by depriving the jury of an especially critical "relevant circumstance that could [have] cause[d] it to decline to impose the [death] penalty," *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987), the trial court violated the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Skipper v. South Carolina*, 476 U.S. 1 (1986).

The practices of other states that employ jury sentencing and life without parole sentences overwhelmingly support petitioner's position. The fact that 20 out of 23 comparable states inform sentencing juries of the defendant's parole ineligibility shows a "nearly universal acceptance [that] . . . establishes the value to the defendant of this procedural safeguard." *Beck v. Alabama*, 447 U.S. at 636-37. By contrast, South Carolina's approach needlessly undermines the jury's historic function in the evolution of society's standards of decency in criminal punishments, and created in this case a constitutionally intolerable risk of an unwarranted or erroneous death sentence.

ARGUMENT

In *California v. Ramos*, 463 U.S. 992 (1983), the Court noted that many states prohibit capital sentencing juries from considering the availability of parole, pardon or commutation. 463 U.S. at 1013 n. 30. These state law rules developed in an era when release on parole was widely available for life-sentenced murderers, and the various states' prohibitions against instructions or jury argument concerning parole were designed to protect capital defendants from jury speculation concerning the likelihood of early parole release if the death penalty was not imposed.[10] In recent years, however, with the steady expan-

[10] *See generally* W.E. Shipley, Annot., *Prejudicial Effect of Statement or Instruction of Court as to Possibility of Parole or Pardon*, 12 A.L.R.3d 832 (1967).

sion of "life without parole" statutes,[11] parole for life-sentenced murderers has increasingly moved from a real possiblity to a jury-room myth, unfounded in reality but ever-present in the deliberations of capital sentencing juries. And with this change, rules that once protected capital defendants from potentially harmful speculation now serve to increase the danger of death sentences based on jurors' misinformed fear of parole release. This case illustrates in stark form the unfairness that can result when the crucial fact of a defendant's lifelong parole ineligibility is withheld from the jury that must sentence him.

I. THE TRIAL COURT'S REFUSAL TO INFORM THE JURY OF PETITIONER'S PAROLE INELIGIBILITY, COUPLED WITH THE STATE'S EMPHASIS ON PETITIONER'S ALLEGED FUTURE DANGEROUSNESS, VIOLATED HIS DUE PROCESS RIGHT TO REBUT THE STATE'S CASE FOR THE DEATH PENALTY.

It would seem almost self-evident that the Eighth Amendment entitles a capital defendant to provide the sentencing jury with the most basic information concerning its non-capital alternative—namely, that state law will keep him in prison, and thereby protect society, if the jury spares his life. Yet the Court need not reach that issue in this case, and may choose not to do so, since the case can be decided on a narrower ground. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827 n. 4 (1986); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985), and authorities cited therein. Because the prosecutor at petitioner's trial argued for a death sentence specifically on the ground of petitioner's future dangerousness, the denial to petitioner of the essential means to meet that argument by informing the jury truthfully that a life sentence would permanently end such future danger amounted to a denial of due process in the

[11] *See generally* Wright, *supra* n.4, at 540-47 (describing and classifying various state life-with-parole statutory schemes).

fundamental sense of " 'a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

A. Why the Trial Court's Refusal to Inform the Jury of Petitioner's Parole Ineligibility Violated the Rule of *Gardner v. Florida*.

The state premised its argument in favor of the death penalty on the factual assertion that society could not defend itself against petitioner in the future unless he was sentenced to die. Now that petitioner was "in our midst," the prosecutor asserted that a death verdict was simply "self-defense," the "response of society to someone who is a threat." J.A. 110, 112. At trial, petitioner made one response to this claim: he showed that he posed no threat to anyone so long as he remained in prison. On this point, petitioner's evidence was strong and unrebutted.

Petitioner's response, as the jury heard it, however, was insufficient to meet the prosecutor's attack. For witnesses on both sides agreed that petitioner would remain a threat if he were ever released from prison, and the prosecutor argued that petitioner posed a threat not to prison staff or inmates, but to "people who can't fight back, who can't resist . . . the old . . . the infirm . . . ." J.A. 105. The jurors obviously recognized that further response was needed, for their note asked for the one piece of information without which the petitioner's case fell short: whether petitioner could be paroled if the jury spared his life.

In fact, petitioner was prepared to offer a response to the very question the jurors asked: as a matter of unambiguous statutory law, petitioner could *never* be paroled. But the jurors never heard that response, because the trial judge forbade petitioner to make it.

In so doing, the trial judge violated "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' " *Skipper v. South Carolina*,

476 U.S. at 5 n. 1 (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1979)); *see also O'Dell v. Thompson*, 112 S.Ct. 618, 619 n. 3 (1991) (Blackmun, J., respecting denial of certiorari) (three members of the Court characterize as a "substantial federal claim" death-sentenced prisoner's argument that his right to rebut the prosecution's case for death was violated by the trial judge's refusal to inform the jury that the only available alternative to death was life without parole, where the prosecutor referred at trial to defendant's prior parole violation). In *Skipper*, all members of this Court agreed that the prosecutor violated the *Gardner* principle when he argued to the sentencing jury that the defendant would probably misbehave in prison after the trial judge had excluded evidence of the defendant's actual record of good behavior while awaiting trial in the county jail. 476 U.S. at 5 n. 1 (majority opinion); *id.* at 9-11 (Powell, J., concurring in the judgment). Egregious though it was, that violation of "fundamental due process" pales in comparison to what happened here. This is so because a capital defendant's ineligibility for parole over the entire span of his natural life is a far more important determinant of whether he will pose an unreasonable risk of further violence than his behavior in jail during the few months immediately preceding his trial, and the fact that a defendant can never be paroled may be expected to weigh much more heavily in a jury's deliberations than will the necessarily speculative predictions of future behavior involved in *Skipper*.[12] Espe-

[12] This is borne out both by the fact that petitioner's jury found the issue important enough to ask about during deliberations, and by petitioner's statewide survey, which showed that more than three-quarters of jury-eligible respondents believed the amount of time a convicted murderer would actually have to serve in prison to be an "extremely important" or "very important" factor in a capital sentencing decision. J.A. 155. As will be seen, public opinion and juror survey research in South Carolina and throughout the nation corroborate petitioner's estimation of the critical importance of parole eligibility as a capital sentencing consideration. *Infra* at 20-23.

cially in this case, where the defendant's entire history of violent behavior was of a kind—attacks on elderly women—that could not possibly recur in a prison environment, the fact that he would be imprisoned without possibility of parole for his entire life if not executed was highly relevant to the issue of his future dangerousness.

The issue was brought into focus by the state's introduction of petitioner's record of prior violent offenses to show his violent propensity—the very record that rendered him permanently ineligible for parole. Once the prosecution presented evidence that petitioner had acted very violently while he was at large in the community, the next logical question—the question that the jury actually asked—was whether there existed any reasonable possibiilty of his being paroled back into that community. By refusing to inform the jury of the unambiguous answer that state law provided, the trial court severely impaired petitioner's ability to meet the state's case for the death penalty.

This one-sided presentation on the issue of future dangerousness was inherently unfair. Although the prosecution was permitted to make unlimited use of petitioner's prior convictions as reasons to sentence petitioner to death, the court barred petitioner from informing the jury that these same convictions operated to diminish substantially any threat of similar acts of violence by him in the future. *See Ake v. Oklahoma*, 470 U.S. 68, 86-87 (1985) (where state relied on psychiatric testimony to prove future dangerousness at capital sentencing hearing, denial of state funds for defense psychiatrist violated due process).

B. The Trial Judge's Ambiguous Answer to the Jury's Parole Inquiry Was Not a Constitutionally Adequate Substitute for Accurate Information.

The respondent will presumably rely upon the state supreme court's conclusion that the trial court's confusing and evasive response to the jury's parole question was the equivalent of an accurate no-parole instruction, and

that it therefore satisfied the requirements of due process. However, the state court's conclusion is unsupported by logic or the record of the proceedings below. At a minimum, there is a "reasonable likelihood" that the jury did not understand the judge's "plain and ordinary meaning" instruction as saying that petitioner could never be released on parole. *Boyde v. California,* 494 U.S. 370, 380 (1990). This is so for several reasons.

1. *The cautionary instruction.*

The first and second sentences of the judge's response ("you are not to consider parole" and "[parole is] not a proper issue for your consideration") actually suggested that a life sentence *did* carry the possibility of parole, but that the jury should let some other authority concern itself with that fact. Indeed, in *State v. Smith,* 298 S.C. 482, 381 S.E.2d 724 (1989), *cert. denied,* 494 U.S. 1060 (1990), the South Carolina Supreme Court remarked that similar cautionary instructions in response to jury inquiries about parole actually convey the message that parole *did* exist, and cause precisely the kind of harm that instructions of this sort are supposed to prevent:

> In [*State v.*] *Johnson,* [293 S.C. 321, 360 S.E.2d 317 (1987)], the trial court charged the jury that "the possibility of parole is of no concern of yours"; in [*State v.*] *Plemmons,* [296 S.C. 76, 370 S.E.2d 871 (1988)], the trial court instructed jurors that "you are not to concern yourself with [parole]." . . . The *Johnson* and *Plemmons* juries, instructed only that parole was not their concern, would have logically inferred that parole was someone *else's* concern. Simply put, those juries were practically invited to speculate about parole eligibility.

381 S.E.2d at 727 (emphasis in original).[13] As *Smith* shows, South Carolina has implicitly acknowledged that a jury question concerning parole eligibility in a case such as this one is among those few settings "in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States,* 391 U.S. 123, 135 (1968). And where the trial court could so easily have removed the need for a cautionary instruction simply by telling the jury the truth about petitioner's ineligibility for parole, the court's refusal to do so is constituionally intolerable.[14]

Moreover, even in the unlikely event that the cautionary instruction had been effective in stifling the jury's discussions about parole, that would not suffice to protect petitioner's due process rights. For once the prosecution was permitted—over defense objection—to argue that petitioner's future dangerousness was a reason to sentence him to death, petitioner was entitled to have his ineligibility for parole considered by the jury as a circumstance that powerfully undercut the persuasiveness of the state's argument. Due process guaranteed petitioner the opportunity to meet the state's dangerousness argument with the single piece of information most likely to assuage the jury's concerns. That opportunity having been denied, the instruction to disregard parole did not cure the resulting due process violation—just as a jury instruction to disregard the issue of the petitioner's likely future conduct

[13] For a review of the evolution of South Carolina law governing parole consideration by capital sentencing juries before the advent of life without possibility of parole, see James M. Hughes, Note, *Informing South Carolina Capital Juries About Parole,* 44 S.C. L. Rev. 383 (Winter 1993).

[14] Petitioner does not suggest that an instruction not to consider parole would be constitutionally suspect in any jurisdiction that actually did authorize parole for convicted capital murderers. *See Johnson v. Texas,* 113 S.Ct. 2658, 2662 (1993) (noting that jury was instructed "not to consider or discuss the possibility of parole"). Where parole is a real possibility for a life-term murderer (as it was *Johnson,* for example, where the defendant would have been eligible for parole in 20 years had death not been imposed, Tex. Code Crim. Proc. Ann. art. 42.18, § 8(b) (West 1985)), cautionary instructions may be the only way to protect the defendant without affirmatively misleading the jury.

in prison would not have cured the due process violation in *Skipper v. South Carolina*. For all of these reasons, the trial judge's instruction to the jury that parole was "not a proper issue for your consideration" failed to restore the fairness of the sentencing proceeding.

2. *The "plain and ordinary meaning" instruction.*

This leaves the instruction that the jury was to understand the term life imprisonment in its "plain and ordinary meaning." The effectiveness of this instruction obviously depended on whether, to the jurors who heard it, the "plain and ordinary meaning" of the term "life imprisonment" was life without possibility of parole. There is no reason to believe that the jurors who sentenced petitioner to death understood the term "life imprisonment" in this way, and substantial reason to think otherwise. *State v. Smith*, 381 S.E.2d at 728 (Chandler, J., dissenting) ("the reality, known to the 'reasonable juror,' [is] that, historically, life term defendants have been eligible for parole").

a. *Public opinion and juror surveys on "the meaning of 'life'".*

Because the prosecution successfully prevailed upon the trial judge to prohibit any voir dire inquiry into the matter, the record does not show for certain what the jurors thought on this question. *Cf. State v. Henderson*, 109 N.M. 655, 658, 789 P.2d 603, 606 (1990) (voir dire statements of jurors revealing their erroneous beliefs about capital defendant's eligibility for parole showed need for accurate parole instruction). On the other hand, petitioner's statewide public opinion poll established that for the large majority of jury-eligible South Carolinians, "life imprisonment" means both the possibility that a murderer will be released after a period of years and the probability that he will be.

The reliability of the University of South Carolina poll was unchallenged below, and the fact that numerous surveys throughout the nation have produced similar results

strongly supports its conclusions. Especially striking are the results of a recent survey of 114 actual South Carolina capital jurors, drawn from a total of 31 cases tried between 1986 and 1992. Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (Nov. 1993). This survey showed not only that these jurors understood "life imprisonment" to mean that the defendant would eventually be released, but that the jurors' actual estimates of when that release would occur correlated strongly with their sentencing decisions. Specifically, jurors who imposed the death penalty estimated the likely period of imprisonment for a capital murderer at an average of 16.8 years, while members of juries that did not return death sentences put the period of incarceration at 23.8 years. *Id.*, Table 2, at 7. Summarizing this data, Eisenberg and Wells concluded that "jurors who believe the alternative to death is a relatively short time in prison tend to sentence to death," while "[j]urors who believe the alternative treatment is longer tend to sentence to life." *Id.*

This finding—that the actual sentencing decisions of capital juries tend to correspond to the jurors' predictions concerning the likely effective length of their "life" sentence alternatives—has been replicated in other states. William J. Bowers, *Capital Punishment & Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 Law & Soc. Rev. 157, 169-70 (1993). Using post-trial juror interviews data from California and Florida as well as the South Carolina data described by Eisenberg and Wells, Bowers found that

> [i]n each of these three states, believing that convicted first-degree murderers would get out sooner is associated with voting for death. Notably, the relationship between belief in early release and voting for death is more pronounced as fewer jurors in the state appear to know what the mandatory minimum sentence is. Thus the difference is . . . most pronounced

in South Carolina where fewer than 15% appear to know the mandatory minimum.

Id.[15]

National public opinion surveys and research in other states provide still more proof that, to the vast majority of Americans, "life imprisonment" means "life imprisonment until parole." *See, e.g.*, Frank A. Bennack, Jr., *The Public, the Media and the Judicial System*, 7 State Ct. J. 4, 10 (1983) (70 percent of Americans in national survey believed that criminals sentenced to "life imprisonment" would not spend rest of life in prison); Anthony Paduano & Clive Stafford Smith, *Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Human Rights L. Rev. 211, 222 n. 33 (1987) (hereinafter, *Deadly Errors*) (randomly selected capital jury veniremen in Cobb County, Georgia believed, on average, that "life sentence" meant imprisonment for 8.1 years); *id.* at 223-25 n. 35 (summarizing results of county-wide survey in Georgia and of jury venire survey in Mississippi, which both showed that estimates of anticipated "life sentence" duration averaged ten years or less); William W. Hood, III, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605, 1624 n. 101 (1989) (median estimate by jury-eligible residents of Prince Edward County, Virginia of time that capital murderer would actually spend in prison on "life imprisonment" sentence was 10 years); Marshall Dayan *et al., Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23

[15] The significance of the South Carolina juror survey data is all the greater in this case, because the South Carolina "mandatory minimum" to which Bowers referred was 30 years—the term that must be served prior to parole eligibility by convicted capital murderers who, unlike petitioner, have no prior convictions for violent offenses. S.C. Code Ann. § 16-3-20(A) (1993 Supp.). The data cited by Bowers reveal that of 114 actual South Carolina capital jurors interviewed, only a negligible number—3.7 percent—understood a life sentence to mean (as it did in petitioner's case) life without parole. *Bowers, supra* at 170, Table 6.

Loy. L.A. L. Rev. 151, 171 (1989) (post-trial interviews of 30 Maryland capital jurors showed that half believed life term inmates would typically serve no more than 10-15 years in prison). In sum, both state and national research provides powerful corroboration for the conclusion of petitioner's statewide public opinion survey that (1) almost no jury-eligible South Carolinians understand the "plain and ordinary meaning" of life imprisonment to be life without parole, and (2) defendants' parole-eligibility (real or imagined) would weigh heavily in most jurors' sentencing decisions.

b. *Legislative History.*

If any more evidence were required that petitioner's jury probably did not understand the "plain meaning" of life imprisonment as excluding the possibility of parole, it can be found in the legislative history surrounding enactment of South Carolina's no-parole provision. During 1985 and 1986, responding to intense public concern about violent crime, the South Carolina General Assembly took up a comprehensive set of criminal justice reform proposals. 1985 S.C. Senate J. 1316. Included among these was a proposal to abolish parole for life term inmates who had been convicted of murder with aggravating circumstances. This life-without-parole proposal initially passed the state House of Representatives, but encountered vociferous opposition from law enforcement officials and prosecutors who feared that such a sentencing alternative would encourage juries not to impose the death penalty in capital cases.[16] Prosecutors insisted that providing juries with a life-without-parole option " 'objectively, over the

[16] One state senator summed up the views of those opposing life without parole during debate on the Senate floor. "[I]f we pass [life without parole], let's close the death house . . . [and] transfer the chair to the state museum." This senator explained that "a juror considering the death penalty will think, 'I can put that person away forever, and my conscience will be clear.' " G. Rigsby, "Senate OKs amended crime bill," *The State* (Columbia, S.C.), March 20, 1986, at 8C.

long haul,' would do away with the death penalty." [17] At the same time, a coalition of high-ranking state law enforcement officials asserted in a letter to the legislature that enacting a life-without-parole sentence "will increase the risk of major crime by encouraging juries to refrain from applying the existing death penalty." [18] Based largely on these views, the state Senate voted to delete life without parole from the anti-crime legislative proposal. 1986 S.C. Senate J. 1071, 1079. The House, however, refused to accept the Senate's rejection of life without parole. Eventually state representative Jean H. Toal, a House leader on the crime bill, proposed a way out of the legislative impasse. Rep. Toal argued that jury decisions in capital cases would not be affected by the no-parole provision because trial judges would not let jurors know about it.

> Mrs. Toal said she disagrees with people who say death [sic] without parole would make the death penalty obsolete.
>
> *Judges would not permit juries to be told anything about a prisoner's chances for serving life or being paroled, she said.*
>
> Ms. Toal said juries would continue to consider a penalty based on the heinous nature of a crime, rather than the possibility of parole.

D. Kern, "House, Senate deadlocked on crime bill," *The State* (Columbia, S.C.), March 27, 1986, at 1C (emphasis added). Ultimately, the state legislature agreed to a compromise under which aggravated murders would be punishable by life imprisonment without eligibility for parole for a minimum of 30 years, and sentences of life without possibility of parole would be reserved for offenders (like petitioner) with prior convictions for violent crimes. *See* 1986 S.C. Acts 2983, 2990; S.C. Code Ann. §§ 16-3-20(A), 24-21-640 (1991 Supp.).[19]

[17] D. Kern, "Anders argues against life without parole, "*The State* (Columbia, S.C.), March 16, 1986, at 4B.

[18] Associated Press, "Crime bill stalemate continues," *The State* (Columbia, S.C.), May 1, 1986, at 12C.

The significance of this legislative history is that it shows how widespread is the recognition, among South Carolina legislators, police officers, and prosecutors, that to South Carolina jurors the "plain meaning" of life imprisonment is "life imprisonment until release on parole," *and that jurors sentence accordingly in capital cases unless instructed otherwise.* Given this history, and in view of the other overwhelming evidence that capital jurors frequently base their sentencing decisions on their exaggerated estimations of the availability of parole, *see supra* at 20-23, there is no basis for the state supreme court's expressed confidence that the trial judge's belated instructions adequately conveyed that petitioner would never be eligible for parole if the jury spared his life.

3. The context of the "plain meaning" instruction.

The record shows that the jury was concerned enough about the subject of parole eligibility to ask for further instructions. This fact alone casts some doubt on any assumption that the jurors understood the "plain and ordinary meaning" of life imprisonment to exclude the possibility of parole: indeed, it was presumably that same

[19] Rep. Toal's prediction that these limitations on parole eligibility would be withheld from capital sentencing juries was briefly proven wrong, when the South Carolina Supreme Court ruled that capital defendants were entitled upon request to a jury instruction concerning the newly-enacted restrictions. *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302, 305-06 (1987). However, less than four years later, in *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), the state supreme court expressly overruled *Atkins*, and held that jury instructions should not include any specific information about parole ineligibility, but should simply direct juries to interpret the term life imprisonment "in its plain and ordinary meaning." 406 S.E.2d at 320 (Chandler, J., concurring for a majority of the court). As noted earlier, petitioner's sentencing hearing began just one month after *Torrence* abandoned the practice of providing full information to capital sentencing juries concerning the parole ineligibility of convicted murderers.

"ordinary meaning" that led the jurors to ask about parole. And it was surely reasonable for the jurors to assume that, if state law actually barred petitioner from parole consideration, the trial judge would have answered their straightforward "yes or no" question about parole with an equally straightforward "no."

As *Boyde v. California*, 494 U.S. 970 (1990), teaches, the setting in which an instruction occurs is important in assessing how the jury probably interpreted it, *accord Johnson v. Texas*, 113 S.Ct. 2658, 2669 (1993); and whether more carefully tailored instructions were necessary. *Accord Taylor v. Kentucky*, 436 U.S. 478, 486-88 (1978). In *Boyde*, the Court declined to assume that jurors who had just listened to four days of mitigation testimony would have interpreted a single jury instruction as barring all of it from their consideration. 494 U.S. at 383-84. Likewise, in this case the trial judge's indirect and rather complex answer to what was in truth a very simple question conveyed its own, unspoken meaning: "Yes, the defendant *will* be eligible for parole, but you're supposed to pretend otherwise while passing sentence."

The fact that the jury returned to the courtroom with a death verdict just minutes after hearing its parole question answered in this fashion underscores the likelihood that the jury understood the judge's answer in this way. Given that parole was obviously an important issue to at least some members of the jury before the jurors returned to the courtroom with their question, one would not expect the jury to have voted unanimously for death so quickly after having been genuinely reassured on this critical issue.

Of course, petitioner cannot conclusively disprove the state supreme court's assumption that the supplemental instruction assuaged rather than exacerbated the jury's concern about parole. But his burden under *Boyde* is not so heavy as that: rather, he need only show a reasonable likelihood that the judge's circuitous instructions were substantially less effective than the truth would have been. In assessing whether such a reasonable likelihood exists, the swiftness with which the adverse verdict followed the instruction is surely entitled to some weight.

So, too, is the position taken by the prosecutor at trial. Contrary to the state's argument on appeal, its position at trial with respect to the various instructions proposed and given suggests that it favored the "plain and ordinary meaning" instruction precisely because such instructions encouraged the jury to assume parole eligibility in passing sentence. If the prosecutor really believed, as the state court later held, that the jury would interpret the "plain meaning" charge as meaning that petitioner would never be eligible for parole, it is hard to understand the state's vigorous opposition to any instruction that plainly stated petitioner's ineligibility in so many words. *See supra* at 3, 7-8. While the prosecutor's subjective motivation is not relevant in and of itself, it does suggest that the prosecution itself took a different view of how the jury would understand the "plain and ordinary meaning" instruction than the state, represented by new counsel, now professes on appeal.

Finally, the "plain meaning" instruction came too late. A fair reading of this record is that the jury had focused its attention on the possibility of petitioner's release on parole before it returned to the courtroom to ask about it, and the judge's unnecessarily evasive response simply sealed petitioner's fate. The jury had heard evidence from the prosecution that petitioner had committed acts of irrational and extreme violence against elderly women over a period of months, and from the defense that these acts of violence stemmed from serious and deep-seated mental disabilities that petitioner appeared largely powerless to control. Therefore, by the time it asked about parole, the jury had likely concluded that no parole-eligible sentence could adequately protect society. Under these circumstances, the record does not support the state supreme

court's conclusion that the "plain meaning" instruction served as an adequate substitute for a simple "no" in response to the jury's question about whether petitioner would be eligible for parole if sentenced to life imprisonment.

II. THE EIGHTH AMENDMENT ENTITLES A CAPITAL DEFENDANT TO HAVE THE SENTENCING JURY INFORMED OF HIS INELIGIBILITY FOR PAROLE UNDER STATE LAW.

Petitioner has argued in the foregoing section that he had a due process right to inform the jury of his lifelong parole ineligibility in response to the prosecution's claim that only his execution could protect society from his violent behavior. Even had the prosecution not p essed this "future dangerousness" rationale for the death penalty, however, the Eighth Amendment's bar against arbitrary and capricious infliction of the death penalty would have entitled him to have the capital sentencing jury accurately informed of the meaning of its "life imprisonment" alternative.

As the joint opinion of Justices Stewart, Powell and Stevens put the matter in *Gregg v. Georgia,*

> [i]f an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never have made a sentencing decision.

428 U.S. 153, 190 (1976). Since *Gregg,* the Court has implemented this fundamental constitutional principle by prohibiting procedures that needlessly undermine the reliability of the capital sentencing process, *e.g., Beck v. Alabama,* 447 U.S. 625 (1980); *Caldwell v. Mississippi,* 472 U.S. 320 (1985), and by requiring that the sentencing authority consider all relevant evidence why death should *not* be imposed in a particular case. *Lockett v. Ohio,* 438 U.S. 586 (1978); *Skipper v. South Carolina,* 476 U.S. 1 (1986). What happened here violated this Court's precedents in both of these areas.

A. Reliability.

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case." *Johnson v. Mississippi,* 486 U.S. 578, 584 (1988) (citations and internal quotation marks omitted). The withholding of the defendant's lifelong parole ineligibility from a jury that must sentence him either to death or to "life imprisonment" offends this principle. By distorting the jury's view of both the incapacitative and retributive effect of the noncapital sentencing alternative, it introduces a needless risk that the jury will be moved to impose the death penalty to eliminate the nonexistent danger of release on parole.

This record shows the risk of error most clearly in the jury's exercise of an ill-informed incapacitative judgment. Given the graphic and undeniably shocking evidence of petitioner's repeated attacks on elderly women, no responsible juror could avoid the question, "If I vote to spare his life, what then?" As a matter of simple common sense, the answer to this question depended in large part on whether petitioner would be securely imprisoned for the rest of his life, or whether he might be released on parole. *See California v. Ramos,* 463 U.S. 992, 1002-09 (1983) (noting relevance of possible gubernatorial commutation of sentence of "life without possibility of parole" to issue of defendant's possible future dangerousness).[20] And that is why the jury asked about parole.

[20] As noted above, *supra* at n.4, the precise issue addressed in *Ramos* could not arise under South Carolina law, since the governor may not commute a prison sentence.

By withholding the answer that state law actually provided, the trial court permitted the jury to sentence petitioner while laboring under a fear arising from an impossibility—a fear which, though groundless in fact, was surely powerful enough to overcome any mitigating considerations. This Court's decisions have frequently recognized the importance of such predictions of future conduct in the capital sentencing process. *Jurek v. Texas*, 428 U.S. 262 (1976); *California v. Ramos, supra*; *Barefoot v. Estelle*, 463 U.S. 880 (1983). It would defy logic to suppose that a jury entrusted with the highly subjective and discretionary decision whether to take or spare the life of a defendant such as this petitioner would be unaffected by the possibility of his being loosed upon society at some point in the future.

The withholding of such important information about the severity of the available life imprisonment option also impaired the jury's retributive judgment. Life without parole is a much harsher punishment than life with the possibility of parole release, not only because of its effect on the prisoner decades hence, but because from the very beginning of his sentence the prisoner is stripped of all hope of freedom or respite. *See* Wilbert Rideau and Ron Wikberg, *Life Sentences* 49-50, 57, 247-56 (1992) (describing hopelessness produced by life without parole sentences in Louisiana). Simply put, a jury's decision between life and death might well turn on the extent to which the severity of the particular form of "life" imprisonment corresponds to the grievousness of the crime that the defendant committed. A capital sentencing jury must make a retributive judgment, and it will make that judgment whether it is given accurate information or forced to rely on uninformed speculation. In a matter so necessarily imprecise and so governed by jurors' subjective emotions, any perception of unwarranted leniency will have its effect, and so it did in this case.

Beck v. Alabama, 447 U.S. 625 (1980), is analogous. In *Beck*, the Court struck down a portion of Alabama's

death penalty statute that precluded the jury from considering lesser included offenses of capital murder. The *Beck* Court recognized that where the evidence would have supported a conviction for a lesser included offense, the "preclusion" clause created an unacceptable risk that the jury might convict the defendant of the greater offense only because the law provided no alternative but outright acquittal, rather than because the evidence actually warranted such a conviction. Like the preclusion clause involved in *Beck*, the trial judge's refusal here to give a clear and comprehensible explanation of the jury's life imprisonment option "enhance[d] the risk of an unwarranted [death sentence]." 447 U.S. at 638. It needlessly pressured the jurors to err on the side of severity, and to impose death simply to foreclose the (illusory) possibility of petitioner's early release, rather than because a death sentence was actually warranted by the evidence. This injection of extraneous and prejudicial considerations into the jury's deliberations "tended to diminish the reliability of the sentencing determination," and "introduce[d] a level of uncertainty and unreliability that cannot be tolerated in a capital case." *Id.* at 638, 643.

Petitioner has already discussed, in connection with the *Gardner* facet of his claim, the reasons why the trial judge's answer to the jury's parole inquiry was constitutionally inadequate to protect petitioner's due process right to rebut the state's case for a death sentence. For all of the same reasons, the "plain meaning" instruction failed to safeguard the reliability of the sentencing process under the Eighth Amendment. In this respect, too, *Beck v. Alabama* is instructive. The "preclusion" clause struck down in *Beck* would have been rendered no more constitutionally acceptable had Alabama law required an instruction that the jury was not to consider the fact that the defendant would be set free completely, despite his possible guilt of a lesser degree of homicide, if the jury acquitted him of any element of capital murder. Once the preclusion clause had needlessly introduced such a

powerful element of irrationality into the jury's deliberations, its effects simply could not be so easily removed. As the *Beck* Court observed, quoting with approval a state supreme court justice's dissenting evaluation of the Alabama scheme:

> "Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. The increasing crime rate in this country is a source of concern to all Americans. To expect a jury to ignore this reality and to find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires of our juries clinical detachment from the reality of human experience."

447 U.S. at 642 (quoting *Jacobs v. State*, 361 So.2d 640, 651-52 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979) (Shores, J., dissenting)). Likewise, to suppose that the jury's fear of petitioner's premature release on parole could be removed simply by informing it that parole was not a proper issue for its consideration would require a "clinical detachment from the reality of human experience" that the Court refused to assume in *Beck*.

Hicks v. Oklahoma, 447 U.S. 343 (1980), further supports this facet of petitioner's claim. In *Hicks*, the Court struck down a 40-year sentence imposed by a jury because the trial judge, in violation of state law, had not instructed the jury that it could impose a substantially lesser sentence. Although jury sentencing is not in itself a constitutional right, *Spaziano v. Florida*, 468 U.S. 447 (1984), and although a properly instructed jury might well have imposed the same 40-year sentence upon Hicks, the Court held that the state had deprived him of his state-created liberty interest in having the jury select his sentence from the full range of alternatives available under Oklahoma law.

The Fifth Circuit has succinctly summarized the holding of *Hicks* in terms especially applicable to the present case:

> [T]o establish a valid *Hicks* claim, the state criminal defendant must show . . . that the sentencing authority lacked knowledge and understanding of the range of sentencing discretion under state law * * * [and that] a substantial possibility exists that the sentencer, if properly informed, would have chosen one of these less severe sentencing options.

Dupuy v. Butler, 837 F.2d 699, 703 (5th Cir. 1988) (footnotes omitted). Here, of course, the sentencing option withheld from the jury was not, as in *Hicks*, the least severe alternative, but rather a noncapital sanction that the jury might well have found especially well-suited to the goal of incapacitation and retribution. Under these circumstances, the likelihood of prejudice is all the greater, and the rationale of *Hicks* therefore applies with special force to this case.

B. The Right to Present Mitigating Evidence.

"When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process." *Walton v. Arizona*, 497 U.S. 639, 653 (1990). In this case, a critical "facet of the sentencing process" about which the jury was not instructed was the meaning and effect of the jury's noncapital alternative of life imprisonment. Because this information provided a reason why the jury might have found the death penalty inappropriate in petitioner's case, and also because without it the jury could not accurately assess the weight to be accorded the other aggravating and mitigating evidence in the case, the withholding of petitioner's parole ineligibility violated yet another well-established Eighth Amendment requirement: that the capital sentencing authority consider "any relevant circumstances that could cause it to decline to impose the [death] penalty

. . . and any relevant information offered by the defendant." *McCleskey v. Kemp*, 481 U.S. at 306; *Lockett v. Ohio, supra.*

South Carolina has sought to avoid the effect of the *Lockett* principle by declaring that a capital defendant's ineligibility for parole is not a mitigating factor; therefore, it may be declared "irrelevant" to the sentencing process as a matter of state law. *State v. Matthews*, 296 S.C. 379, 373 S.E.2d 587, 592 (1988), *cert. denied*, 489 U.S. 1091 (1989); *State v. Patterson*, 384 S.E.2d at 702-03 (declaring that parole eligibility "is not mitigating evidence and is irrelevant to a defendant's adaptability to prison life," and asserting that whether to instruct on parole is a matter of state law only); *State v. Bell*, 305 S.C. 11, 406 S.E.2d 165, 171 (1991), *cert. denied*, 112 S.Ct. 888 (1992); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315, 323 (1991). But as this Court has held, unreasonably narrow definitions of "relevance" may not trump defendants' federal constitutional rights. *McKoy v. North Carolina*, 494 U.S. 433 (1990) (fact that North Carolina law treated non-unanimous jury findings of mitigating factors as "irrelevant" did not authorize exclusion of such findings from sentencing process under Eighth Amendment).

The flaw in the South Carolina Supreme Court's position is revealed by *Skipper v. South Carolina*, 476 U.S. 1 (1986), in which this Court rejected a similarly restrictive reading of *Lockett* in an analogous context. *Skipper* held that a capital sentencing authority may not be precluded from considering, as a mitigating factor, the likelihood that a convicted murderer would prove to be a cooperative and nonviolent prison inmate if sentenced to life imprisonment rather than to death. In so ruling, the Court noted that a capital defendant's likely future good behavior has no bearing on his culpability for the crime that he committed. 476 U.S. at 4. However, a defendant's future dangerousness or nondangerousness has always been regarded as a relevant sentencing consideration. *Jurek v. Texas*, 428 U.S. 262 (1976); *Barefoot v. Estelle*, 463 U.S. 880 (1983). The Court held therefore that a defendant's likely future good behavior in prison is " 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.' " *Skipper*, 476 U.S. at 4-5 (quoting *Lockett v. Ohio*, 438 U.S. at 604).

Skipper establishes that the constitutional meaning of the term "mitigating" is broader than simply that which lessens a defendant's moral blameworthiness. Although considerations of moral culpability are certainly encompassed by this concept, *see, e.g., Eddings v. Oklahoma*, 451 U.S. 104 (1982) (defendant's violent childhood must be considered in mitigation), *Skipper* shows that evidence may have little or no relevance to a defendant's moral blameworthiness, and yet be "mitigating" under the Eighth Amendment principles of *Lockett*.[21]

Skipper concerned the exclusion of evidence, rather than the withholding of accurate legal information from the jury. But *Skipper* gives no hint that the result would have differed if the information withheld from the jury in that case had been a rule of law rather than a predictive fact bearing on the defendant's future dangerousness. Indeed, as the state has already acknowledged in this case, "an individual's adaptability to prison may be more speculative than parole ineligibility . . . ." Brief of Respondent

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[21] The Court has taken a correspondingly broad view of relevance in assessing the admissibility of evidence in aggravation, recognizing, for example, that a state may properly treat as relevant to a capital sentencing decision the full range of the harm caused by the murder, regardless of whether the murderer was fully aware of that harm when he acted. *Payne v. Tennessee*, 111 S.Ct. 2597 (1991). *See generally Gregg v. Georgia*, 428 U.S. at 203-04 (joint opinion of Stewart, Powell and Stevens, JJ.) ("So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information as possible when it makes the sentencing decision.").

in Opposition to Petition for Writ of Certiorari, at 17. Because a capital defendant's ineligibility for parole for the rest of his life bears so much more directly on whether he will pose an unacceptable risk of further violence than does his behavior in jail during the few months before trial, *Skipper* compels the conclusion that such ineligibility is a mitigating circumstance that cannot be constitutionally withheld from the sentencing jury when it is offered, as it was here, as a basis for a sentence of less than death. *Lockett*; Paduano & Smith, *Deadly Errors*, at 238-44.[22]

Petitioner's parole-ineligible status is not simply *analogous* to the prison-behavior evidence that *Skipper* held admissible as a matter of Eighth Amendment law. Rather, that status is actually an integral *part* of petitioner's *Skipper* evidence. In other words, even if petitioner's no-parole status is not deemed a mitigating circumstance in and of itself, it was nonetheless highly relevant to establish a mitigating circumstance, and its exclusion violated *Lockett* because it substantially impaired the jury's ability to assess the significance of other, indisputably relevant mitigating evidence.

Petitioner's ineligibility for parole was the indispensable factual predicate for his *Skipper* evidence. At trial he produced substantial evidence demonstrating the likelihood of his future good behavior as a prison inmate. That

[22] Petitioner must acknowledge the semantic awkwardness of characterizing a severe noncapital sentencing alternative as "mitigation." However, this awkwardness derives only from the fact that the English language does not contain a term for "mitigating in the sense that [a given fact] might serve 'as a basis for a sentence less than death,'" *Skipper*, 476 U.S. at 4-5 (internal citation omitted), rather than from any logical flaw in petitioner's claim. This is not the first case in which the Court has been confronted with an important capital sentencing concept for which no simple word could be found. *See Sawyer v. Whitley*, 112 S.Ct. 2514, 2522 (1992) (Court gives "sensible meaning . . . to the term 'actually innocent of the death penalty'" in context of abusive or defaulted habeas challenge to death sentence).

evidence unquestionably was "relevant" within the meaning of *Lockett*. *Skipper v. South Carolina, supra; Boyde v. California*, 494 U.S. at 382 n. 5 (1990). Yet the weight of that evidence was logically dependent on whether petitioner would in fact *remain* in prison if the jury spared his life. *See Franklin v. Lynaugh*, 487 U.S. 164, 178 (1988) (construing *Skipper* as specifically concerned with capital defendant's right to prove his lack of future dangerousness in prison). By withholding that ineligibility from the jury, the trial judge unfairly minimized the significance that the jury would likely have accorded to petitioner's probable good behavior in prison.

Although states may provide a framework for the jury's consideration of mitigating factors, *Franklin v. Lynaugh*, 487 U.S. at 179; *Johnson v. Texas*, 113 S.Ct. 2658 (1993), they may not distort the logical significance of a defendant's mitigating evidence by arbitrary rulings that leave the sentencer with "no reliable means of giving effect to that evidence." *Graham v. Collins*, 113 S.Ct. 892, 902 (1993); *see McKoy v. North Carolina*, 494 U.S. at 452-56 (Kennedy, J., concurring). Withholding the simple truth about petitioner's parole ineligibility did exactly that. Therefore, it violated the rule of *Lockett*. *Mills v. Maryland*, 486 U.S. 367 (1988) (*Lockett* violated by jury instructions that might have impeded individual jurors' ability to give effect to mitigating factors); *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

The South Carolina Supreme Court has cited this Court's decision in *Carolina v. Ramos* as support for its view that withholding a capital defendant's parole ineligibility from a sentencing jury raises no federal constitutional issue. *See, e.g., State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699, 702-03 (1989), *vacated on other grounds*, 493 U.S. 1013, (1990), 111 S.Ct. 2913 (1991). *Ramos*, however, is entirely consistent with petitioner's claim. In upholding against Eighth Amendment challenge California's decision

to provide sentencing juries with *accurate* information concerning the governor's power to commute a life-without-parole sentence, the *Ramos* Court noted the "elementary" fact that states remained free to prohibit consideration of defendants' parole eligibility as a means of providing "*greater* protections in their criminal justice system than the Federal Constitution requires." 463 U.S. at 1013-14 (emphasis added). But given the Court's emphasis on the accuracy of the challenged commutation instruction, *id.* at 1009, *Ramos* cannot fairly be read as authority for concealing truthful, exact and crucially important sentencing information which, if known, might lead sentencing juries to choose life instead of death. *See also Caldwell v. Mississippi*, 472 U.S. at 341-43 (O'Connor, J., concurring).

III. PETITIONER'S REQUEST TO PROVIDE THE JURY WITH ACCURATE INFORMATION ABOUT HIS PAROLE INELIGIBILITY WOULD HAVE BEEN HONORED IN ALL BUT TWO OTHER COMPARABLE STATES.

Petitioner's constitutional claim is a narrow one. It does not call into question the general rule against consideration of parole *eligibility*, where capital defendants actually *are* eventually eligible for parole if not sentenced to death. *See California v. Ramos*, 463 U.S. at 1013 n. 30. Petitioner simply submits that where such eligibility does not exist as a matter of state law, rules designed to avoid speculation about whether and when parole might actually be granted are no longer necessary, and must not be misapplied to permit the very evil they were originally designed to prevent.

The practical effect of a ruling in petitioner's favor would also be relatively narrow. This is so because the capital sentencing procedures of most of the 26 capital jury-sentencing states that employ a life-without-parole alternative already comport with the constitutional principle invoked here.

In 17 of these states, the jury is expressly informed of the defendant's ineligibility for parole by the terms of the sentencing verdict or recommendation itself.[23] In three additional states, statutory or decisional

[23] These 17 jurisdictions may be divided into two subcategories: those that simply identify the jury's sentencing alternatives as death and life without parole, and those that allow the jury to specify whether a life sentence should be with or without parole eligibility. The nine states in the first category are *Alabama*, *see* Ala. Code § 13A-5-46(e) (1982) (jury recommends either death or "life imprisonment without parole"); *Arkansas*, *see* Ark. Code Ann. 5-4-603(b) (Supp. 1993) (jury may sentence to "life imprisonment without parole"); *California*, *see* Cal. Pen. Code 190.3 (West 1988) (trier of fact decides between death and a "term of life without the possibility of parole"); *see also* 1 *California Jury Instructions, Criminal* 8.84.2 (4th ed. 1979) (quoted in *Boyde v. California*, 494 U.S. at 374); *Connecticut*, *see* Conn. Gen. Stat. § 53a-46a(f) (West 1985) (verdict alternative to death is "life imprisonment without the possibility of release"); *Delaware*, *see* Del. Code Ann. tit. 11, 4209(a) (1987) (imprisonment for remainder of defendant's natural life "without the benefit of probation or parole" is the only available verdict other than death); *Louisiana*, *see* La. Code Crim. Proc. Ann. art. 905.6 (West Supp. 1993) (jury returns sentencing verdict of death or "life imprisonment without benefit of probation, parole or suspension of sentence"); *see also Lowenfield v. Phelps*, 484 U.S. 231, 235 (1988) (quoting jury instructions); *Missouri*, *see* Mo. Ann. Stat. § 565.030.4 (Vernon Supp. 1993) (after appropriate instructions and argument of counsel, jury must choose between death and "imprisonment for life without eligibility for probation or parole, or release except by act of the governor"); *New Hampshire*, *see* N.H. Rev. Stat. Ann. § 630:5 (IV) (Supp. 1992) (jury determines whether death should be imposed rather than "life imprisonment without possibility of parole"); and *Washington*, *see* Wash. Rev. Code Ann. § 10.95.030(1), 95.050 (West 1990) (jury chooses between death or "life imprisonment without possibility of release or parole").

The eight states that allow the jury to specify whether the defendant should or should not be eligible for parole are *Georgia*, *see* 1993 Georgia Laws 569, Ga. Code § 17-10-31.1(a) (Supp. 1993) (jury must select between binding sentencing alternatives of death, life imprisonment without parole, and parole-eligible life imprisonment); *Indiana*, *see* Ind. Code § 35-50-2-9 (Supp. 1993) (capital

law requires that the sentencing jury be instructed that the defendant will be ineligible for parole, either in all cases, or where (as in petitioner's case) the defendant's prior criminal record precludes his parole consideration.[24]

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sentencing juries required to recommend to the court whether "the death penalty or life imprisonment without parole, or neither, should be imposed"); *Maryland, see* Md. Ann. Code art. 27, § 413(c)(3) (1987) (jury chooses between death, life imprisonment, or "imprisonment for life without the possibility of parole"); *Nevada*, see 1993 Nev. Stat. 182; Nev. Rev. Stat. Ann. § 175.554(2)(c)(2), -(4) (1992) (jury's sentencing alternatives for first degree murder are "life imprisonment with the possibility of parole, life imprisonment without possibility of parole, or death"; jury must specify whether life sentence is to be parole-eligible); *Oklahoma, see* Okla. Stat. Ann. tit. 21, 701.10(A) (West 1993) (jury chooses between "death, life imprisonment without parole or life imprisonment"); *Humphrey v. State*, No. F-88-57, 1993 WL 380100 (Okl. Cr. Sept. 27, 1993) (death sentence rendered "fundamentally unfair" by court's failure to instruct jury on newly-enacted "life without parole" alternative to death penalty and life imprisonment); *Oregon, see* Or. Rev. Stat. § 163.105 (Supp. 1992) (jury's sentencing alternatives for aggravated murder are "death, life imprisonment without the possibility of release or parole or life imprisonment"); *Tennessee, see* Tenn. Code Ann. § 39-13-204(a), -(f)(2) (Supp. 1993) (jury must choose between death, life without possibility of parole, and life without parole for at least 25 years); and *Utah, see* Utah Code Ann. § 76-3-207(4) (Supp. 1993) (jury instructed to choose between death, "life in prison without parole," and life in prison).

[24] *Colorado* capital sentencing juries must be instructed that life imprisonment means life without the possibility of parole. Colo. Rev. Stat. § 16-11-103(1)(b) (Supp. 1993). In *Illinois*, a sentencing jury is to be informed that a life sentence for aggravated, repeat or multiple murder under Ill. Rev. Stat. ch. 38, para. 1005-8-1 (Smith-Hurd Supp. 1992), is for the remainder of the defendant's life, and that no such defendant "can be paroled or released, except through executive clemency." *People v. Gacho*, 122 Ill.2d 221, 522 N.E.2d 1146, 1166 (1988). The *Mississippi* Supreme Court has held that where a capital defendant is ineligible for parole by reason of his status as an habitual offender under Miss. Code Ann. § 47-7-3(1)(a) (Supp. 1992), the defendant is constitutionally entitled to have the trial judge inform the sentencing jury of his parole ineligibility. *Turner v. State*, 573 So.2d 657 (Miss. 1990), *cert. denied*, 111 S.Ct. 1695 (1991); *Mackbee v. State*, 575 So.2d 16, 38-41 (Miss. 1990); *accord Berry v. State*, 575 So.2d 1, 13-14 (Miss. 1990), *cert. denied*, 111 S.Ct. 2042 (1991).

One state, Florida, authorizes life without possibility of parole only under relatively rare circumstances, and has not yet addressed whether defendants facing such sentences are entitled to have the jury apprised of their prospective parole ineligibility.[25] Two of the remaining life-without-parole jurisdictions—South Dakota and Wyoming—have not considered the question of whether jurors should be instructed concerning the unavailability of parole under those states' current bifurcated capital sentencing procedures.[26]

This leaves only two jurisdictions other than South Carolina, Pennsylvania and Virginia, that impose life without possibility of parole on some or all convicted murderers but refuse to require that judges inform capital sentencing juries of that fact.[27] Neither the Penn-

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[25] A newly-enacted Florida statute provides for a sentence of "imprisonment for life without possibility of early release" for the first degree murder of any law enforcement officer. 1993 Fla. Sess. Law Serv. 93-406, S.B. 26-B, § 16; Fla. Stat. 775.0823(1) (effective 1/1/94). Florida law also provides for a life without parole sentence for drug trafficking murders when death is not imposed. Fla. Stat. 921.142 (West 1992). While the Florida courts have not construed either of these provisions, the state supreme court has approved for publication pattern jury instructions that inform capital sentencing juries of the no-parole feature of § 775.0823(1). *Standard Jury Instructions—Criminal Cases*, 603 So.2d 1175, 1205 (Fla. 1992).

[26] *See* S.D. Codified Laws Ann. § 24-15-4 (1988); Wyo. Stat. §§ 6-2-101(b), 7-13-402(a) (Supp. 1992).

[27] 61 Pa. Cons. Stat. Ann. § 331.21 (Supp. 1993) (parole board may not release life prisoners); *Commonwealth v. Henry*, 524 Pa. 135, 569 A.2d 929, 941 (1990), *cert. denied*, 499 U.S. 931 (1991); *Commonwealth v. Strong*, 522 Pa. 445, 563 A.2d 479, 485-86 (1989), *cert. denied*, 494 U.S. 1060 (1990); Va. Code § 18.2-10, -31 (Supp. 1991) (Class 1 felony punishable by death or life imprisonment); Va. Code Ann. § 53.1-151(B) (Supp. 1992) (certain recidivists

sylvania nor Virginia courts appear to have explained in any detail the reasons for their unusual position. Therefore, it is not possible to discern whether any peculiarity of Pennsylvania or Virginia law may justify the refusal of those states to inform capital sentencing juries of capital defendants' permanent ineligibility for parole.[28]

In sum, petitioner's request that the jury be told that a life sentence means life without parole would have been granted in all but a handful of jurisdictions. Indeed, in at least 20 life without parole states petitioner's request would have been unnecessary, because the trial judge would have submitted verdict forms to the jury making

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ineligible for parole); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 112 S.Ct. 88 (1991); *O'Dell v. Commonwealth*, 364 S.E.2d 491, 507, *cert. denied*, 488 U.S. 871 (1988); *see also O'Dell v. Thompson*, 112 S.Ct. 618 (1991) (Blackmun, J., opinion respecting denial of certiorari). For a detailed discussion of the constitutionality of Virginia's treatment of this issue before *O'Dell*, see William W. Hood, III, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605 (1989).

[28] One factor that might help to explain the position taken by the Pennsylvania and Virginia courts is that, in contrast to South Carolina, both states provide for gubernatorial commutation of prison sentences. Pa. Const. art. 4, § 9(a) (1969) ("In all criminal cases except impeachment, the Governor shall have power . . . to grant . . . commutation of sentences" subject to recommendation of Board of Pardons); Va. Const. art. V, § 12 (1987) ("The Governor shall have power to remit fines and penalties . . . [and] to grant reprieves and pardons after conviction . . ."). Because a sentencing verdict of "life imprisonment without possibility of parole" might be deemed misleading where state law provides for the possibility of gubernatorial commutation, *see California v. Ramos*, 463 U.S. at 1009, it is perhaps arguable that a state may exclude all mention of post-conviction release in jurisdictions where such commutation is possible. But as noted previously, South Carolina is one of only two death penalty states in which sentences of life-without-parole may *not* be modified by gubernatorial commutation. Ala. Const. amend. XXXVIII § 124 (governor may commute only death sentences); S.C. Const. art. IV, § 14 (1976) (same); *see* Wright, *supra* n.4, at 550 n.141.

clear that the life sentence alternative was without possibility of parole, or else would have instructed the jury to that effect.[29]

Although such an overwhelming weight of authority among life-without-parole jurisdictions does not, in and of itself, condemn as unconstitutional the practices of the three minority states, the readiness of all but a few states to enlighten the jury on the point surely suggests the importance of the information at issue. The Court's observation regarding the general rule governing submission of lesser included offenses in *Beck v. Alabama* could be said of parole ineligibility as well: "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard." 447 U.S. at 636-37.

IV. THE STATE'S CONCEALMENT OF THE LIFE-WITHOUT-PAROLE OPTION UNDERMINED THE JURY'S CONSTITUTIONAL ROLE AS A LINK BETWEEN THE PENAL SYSTEM AND CONTEMPORARY COMMUNITY VALUES.

Before concluding, petitioner would make a final observation about South Carolina's refusal to provide juries with essential information about the true severity of their non-capital sentencing option. This Court's cases have frequently noted the importance of the jury as "a significant and reliable objective index of contemporary values" regarding the death penalty. *Gregg v. Georgia*, 428 U.S. at 181. *See Stanford v. Kentucky*, 492 U.S. 361, 393-94 (1989) (assessing evidence of jury capital sentencing behavior respecting 16-year-old and 17-year-old murderers); *Enmund v. Florida*, 458 U.S. 782, 794-96

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[29] In four additional states, the capital sentencing decision is made by the trial judge alone or by a sentencing panel of judges. Thus in these states as well, the sentencing authority is fully aware of the precise parole status of life-sentenced murderers. Ariz. Rev. Stat. Ann. § 13-703(B) (Supp. 1993); Idaho Code § 19-2515(d) (Michie 1987); Mont. Code Ann. § 46-18-301 (1993); Neb. Rev. Stat. § 29-2520 (1993).

(1982) (same; death penalty for unintended felony murder); *Coker v. Georgia,* 433 U.S. 584, 596-97 (1977) (same; death penalty for rape). But in order for the jury to serve this "important function" of "maintain[ing] a link between contemporary community values and the penal system," *Witherspoon v. Illinois,* 391 U.S. 510, 519 n. 20 (1968), jurors must be apprised of the rudimentary facts concerning how the penal system operates. The historical process by which virtually all severe corporal punishments have disappeared from American criminal justice shows why this is so.

Debating the proposed Cruel and Unusual Punishments Clause of the Eighth Amendment on the floor of the First Congress, Rep. Livermore thought it self-evident that "villains often deserve whipping, and perhaps having their ears cut off . . . ." 1 Annals of Cong. 754 (1789), *quoted in Furman v. Georgia,* 408 U.S. 238, 262 (1972) (Brennan, J., concurring). The subsequent disappearance of both flogging and mutilation as criminal punishments —a disappearance so complete that such punishments would unquestionably be deemed cruel and unusual under the Clause today—is the clearest example of how, in "set[ting] its face against" given forms of punishment, *Stanford v. Kentucky,* 492 U.S. at 378, this nation establishes "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101 (1958). But these corporal punishments did not simply disappear. Rather, during the course of the nineteenth century they were *replaced.* Their replacement was imprisonment—a practical alternative that scarcely existed in the colonial era. *See* Lawrence M. Friedman, *Crime and Punishment in American History* 74-82 (1993). For this process of substitution to have worked as it did, it was essential that the decision-maker—whether legislature, judge or jury—be aware that an alternative to flogging or mutilation existed. Once legislative and sentencing authorities were provided with this alternative, there began an evolutionary process that culminated in

the total rejection of the older forms of punishment. But had sentencing authorities been prevented from considering noncorporal punishments, there can be no doubt that flogging and mutilation would have persisted as criminal sanctions for appreciably longer periods of time.

South Carolina was free to make the judgment that life without parole was too unworkable, costly, or otherwise problematic a punishment to enact as an alternative to the death penalty. But having adopted that alternative punishment, the state was not entitled to short-circuit and distort the sentencing judgment of juries in individual cases by concealing its existence. Because South Carolina did just that here, petitioner submits that his sentence of death may not be carried out.

CONCLUSION

For the foregoing reasons, the judgment of the South Carolina Supreme Court should be reversed insofar as it leaves undisturbed petitioner's sentence of death.

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OF THE UNITED STATES
October Term, 1992

JONATHAN DALE SIMMONS,

Petitioner,

vs.

SOUTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. Did the trial court's refusal to inform the jury that Petitioner could never be paroled if sentenced to life imprisonment violate his due process right to rebut the prosecution's case for death, where the state argued that Petitioner would pose a grave risk of future violence unless he was executed, and where the jury specifically asked about the possibility of parole? (Question II on Petition).

II. Does the Eighth Amendment entitle a capital defendant to have the sentencing jury informed, as a reason not to impose the death penalty, that under state law the jury's sentencing alternative of "life imprisonment" means life without the possibility of parole? (Question I on Petition).

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BRIEF OF RESPONDENT

The Respondent, State of South Carolina, hereby submits this Brief of Respondent on Writ of Certiorari to the Supreme Court of South Carolina.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported as State v. Simmons, 427 S.E.2d 175 (S.C. 1993), and is reprinted in the Joint Appendix (hereafter "J.A.") at 164-174. The Order of the South Carolina Supreme Court denying rehearing is unreported, and is reprinted at J.A. 175.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 1, 1993. A timely Petition for Rehearing was denied on March 10, 1993. The Petition for Writ of Certiorari was filed on June 8, 1993, and granted on October 4, 1993. This Court's jurisdiction is alleged to be

invoked pursuant to 28 U.S.C. Section 1257(a). Respondent will assert that there is no federal question presented and the Court is without jurisdiction to review the claim. U.S.S.Ct.R. 10.1(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

2. It also allegedly involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> [N]or shall any state deprive any person of life ... without due process of law ....

3. It also involves S.C. CODE Sections 16-3-10, et seq. (1991 Cum. Supp.), which code sections are reprinted in the Appendix to the Petition for Writ of Certiorari at A-8 through A-14.

4. It also involves S.C. CODE Section 24-21-640 (1991 Cum. Supp.), which provides in pertinent part:

> The [South Carolina] Board [of Probation, Parole and Pardon] must not grant parole, nor is parole authorized, to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60. Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense.

5. It also involves S.C. CODE Ann. Section 16-1-60 (1991 Supp.), which provides in pertinent part:

> For purposes of definition under South Carolina law a violent crime includes the offenses of murder, criminal sexual conduct in the first and second degree ... [and] burglary in the first degree ....

STATEMENT OF THE CASE

a. Procedural History.

This case involves the tragic and brutal murder of Ms. Josie Lamb. On July

17, 1990, Ms. Lamb, a seventy-nine year old female who lived alone, was found dead on the bathroom floor of her home in the Olympia residential area of Columbia, South Carolina. Her skull had been crushed by Jonathan Dale Simmons, the Petitioner, who had used a toilet tank lid to repeatedly beat her on the head. She had suffered multiple blows to the head resulting in three fractures and nine lacerations. Her forearms were also bruised. The bathroom was also splattered with blood.

The evidence revealed that Simmons had entered her home through the side door on the evening of July 16, 1990, with the intent to commit sexual assault upon Ms. Lamb. He had apparently been to her home the previous week but, when he approached and touched the door handle, Ms. Lamb had screamed and he fled. On the night of the murder, he entered the home and then heard

her scream. After looking around to be sure that no one else was present, Simmons went into the bathroom and struck Ms. Lamb repeatedly on her head with the commode lid with such suddenness and violent force that death was essentially instantaneous and her right hand still held the toilet paper she was using.

At some point, Simmons had unplugged Ms. Lamb's telephone. Also, he rummaged through her bedroom drawers and then stole a nightgown. Simmons' fingerprint was found on the commode lid and his bloody footprint was found on the floor. He was arrested the next day and confessed to killing Ms. Lamb.

The Petitioner, Jonathan Dale Simmons, was indicted by the Grand Jury of the Court of General Sessions for Richland County for murder, burglary in the first degree, and petit larceny on October 18, 1990. On January 24, 1991, the Solicitor

of the Fifth Judicial Circuit, the Honorable Richard A. Harpootlian, served Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation pursuant to S.C. CODE ANN. 16-3-26 (1986 Supp.).

The Petitioner proceeded to trial on June 24, 1991, before the Honorable Ralph King Anderson, Jr., Presiding Judge, and a jury. He was represented by Thomas J. Quinn, Jennifer Kneece Shealy, and Thomas W. Bunch, II, through court appointment. The State was represented by Solicitor Richard A. Harpootlian, Deputy Solicitor Warren B. "Barney" Giese, and Assistant Solicitor Jonathan S. Gasser. On June 27, 1991, the jury convicted the Petitioner of murder, burglary in the first degree, and petit larceny.

In the guilt phase of the trial, defense counsel conceded that Simmons had in fact murdered Ms. Lamb and had taken

the nightgown. He contended, however, that burglary in the first degree had not been proven concerning his intent to commit a crime in Ms. Lamb's house. In response, the prosecution introduced evidence of Simmons' confessions to other crimes of beatings and sexual assaults involving three elderly female victims: Faris Mims, Marie Furtick, and Estelle Simmons. As the Supreme Court of South Carolina stated concerning the admission of this evidence:

> The evidence of appellant's violence against elderly women, each of whom was alone in her home at the time of the attack, makes more probable appellant's criminal intent when he entered Ms. Lamb's house since he already knew her to be an elderly woman. Although there was no sexual assault in Ms. Lamb's case, all of the previous sexual assaults were accompanied by terrific physical violence far beyond that need to accomplish the sexual assault itself. Moreover, theft was not the overwhelming motivation in these prior cases. It is logical to conclude from the evidence that appellant was

> chiefly motivated in each case by an intent to violently injure an elderly woman.

(J.A. 168).

On June 28, 1991, the sentencing hearing began. During the hearing, Mr. Simmons was also represented by current counsel David I. Bruck, Esquire. After the presentation of evidence in aggravation and evidence in mitigation, the jury, on June 30, 1991, returned a unanimous verdict finding the existence of the statutory aggravating circumstance of murder was committed while in the commission of burglary in the first degree and a sentence of death. The trial judge affirmed the jury recommendation of death for murder. Judge Anderson sentenced the Petitioner to death for murder, life imprisonment for burglary in the first degree, and thirty (30) days consecutive for petit larceny.

Defense counsel timely served Notice of Appeal on July 1, 1991, and this appeal followed. On August 18, 1992, the Petitioner filed his Final Brief of Appellant raising the following pertinent issue:

> II. Where the state alleges that the defendant will pose an unreasonable risk of future violent acts unless executed, and where state law precludes all possibility of his release on parole if he is sentenced to life imprisonment, is the defendant constitutionally entitled to have the jury apprised of his ineligibility for parole?

The Petitioner was represented by Mr. Bruck and M. Anne Pearce of the South Carolina Office of Appellate Defense. The Respondent was represented by current counsel, Donald J. Zelenka of the Attorney General's Office. Oral argument was heard on October 13, 1992. On February 1, 1993, the Supreme Court of South Carolina entered its opinion affirming the judgment of conviction and sentence of death.

State v. Simmons, 427 S.E.2d 175 (S.C. 1993). A timely Petition for Rehearing was denied on March 10, 1993.

b. Pertinent facts of the case.

1. How the issue of parole ineligibility was presented.

Prior to the voir dire, the prosecution requested the trial judge to exclude any mention of "parole" throughout the trial. (J.A. 2). The prosecutor relied upon the state court decision in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315, 321 (1991), in which Justice Chandler in his majority concurring opinion stated that prior decisions of the state court were overruled "to the extent it permits the introduction of parole into the capital sentencing decision." Defense counsel disagreed on that interpretation and stated that they desired to be able to inquire of all jurors at the outset of voir dire on what life imprisonment meant

to them and whether it meant "an absolute life" or "some future parole eligibility" or "a natural life, no parole no max-out." (J.A. 5). The state trial judge, considering the Torrence decision, concluded that it "holds that a capital defendant is not entitled to probe potential jurors' misconceptions about the parole eligibility of persons sentenced to life imprisonment by advising them on voir dire what a life sentence meant to them." (J.A. 6).[1] The trial court then held that

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[1]The trial court further relied upon State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988), cert. den. 489 U.S. 1091 (1989), in which the South Carolina Supreme Court rejected an identical argument that a capital defendant's claim that he was constitutionally entitled to apprise the jury of restrictions on his eligibility for parole. Contrary to the Petitioner's erroneous illusion that the prosecutor "recognized the critical significance of petitioner's parole ineligibility in the determination of the sentence," Brief of Petitioner at 3, it is clear that the prosecutor and trial judge were seeking to have a trial free from error and in accord with the state law limitations established in Torrence, supra. Matthews, supra, 379 S.E.2d at

Torrence would be applied in this case at the appropriate time of jury instructions and that it "would not allow voir dire examination in regard to parole eligibility." (J.A. 7). The record of the voir dire reveals both parties complied with the trial judge's mandate and the specter of parole or early release was not injected into the jury selection process. The trial judge, in his opening remarks to the prospective jurors, used the terms "death penalty" and "life imprisonment." (Record on Appeal (hereafter cited as R.A.) at 157-160). In discussing the manner of the death penalty, the court stated "by death penalty, we mean death by electrocution." (J.A. 157).

During the guilt phase of the capital trial, the prosecution presented evidence conclusively establishing that Simmons

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590.

murdered Ms. Lamb. Because the defense disputed that Simmons had "intent to commit a crime" upon his entry into Ms. Lamb's home, the state was able to present evidence form his confession that the murder of Ms. Lamb was one of a series of brutal attacks on elderly women that covered a fourteen-month period and ended with his arrest the day after Ms. Lamb's death. This evidence demonstrated a proclivity for brutalizing elderly women and sometimes raping them in their own homes and stealing their property. At no time in the guilt phase of the trial did the trial court or either party mention anything about parole or early release. Based upon this overwhelming evidence, the defendant was convicted of murder, burglary in the first degree and petit larceny. (R.A. 1552).

Prior to the beginning of the sentencing proceeding, counsel for the

defense proffered exhibits in an in camera proceeding that the Petitioner had pled guilty on June 19, 1991, in Lexington County, South Carolina, to two counts of criminal sexual conduct in the first degree and one count of burglary in the first degree and received a sentence of thirty (30) years on each count of criminal sexual conduct and life imprisonment on burglary. Defense counsel also called the general counsel of the South Carolina Department of Corrections, Larry Batson, to testify out of the presence of the jury. (J.A. 10-19). Mr. Batson testified that the crimes of murder, criminal sexual conduct in the first degree, and burglary in the first degree were "violent crimes" in South Carolina. (J.A. 11-12). Further, he stated that assuming the person was convicted for murder after a separate sentencing for criminal sexual conduct and

burglary in the first degree not from the same series of events and received a life sentence, the inmate would not be eligible for parole. (J.A. 12-13). Mr. Batson acknowledged that inmates serving life sentences are outside of the confines of the prison on short-term holiday or weekend furlough programs, and work release programs. (J.A. 14). Further, Mr. Batson recognized that their regulations could "certainly be subject to change" which may restrict certain inmates from the programs. (J.A. 14). Furthermore, he stated there are no statutory laws prohibiting an inmate serving a life sentence without parole form being furloughed, being put on work release,[2] or receiving a holiday furlough.

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[2]Pursuant to S.C. Code Ann. Section 24-13-610, an inmate is not eligible for the "extended work release" program even if he has participated in a "work release" program if convicted of murder or criminal sexual conduct in the first or second degree. See also Section 24-13-650 (work

(J.A. 18). Also, he said that he could not say that he would always remain behind bars. (J.A. 18). A stipulation was also presented by counsel for the South Carolina Probation, Parole and Pardon Board that "they will not consider for parole anyone serving a sentence of life without parole." (J.A. 19).[3]

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release program eligibility for violent criminals).

[3]Respondent would submit however the obvious fact that future legislative change could benefit inmates to allow for parole eligibility when at the time the "violent" crime was committed he was not eligible for parole. For example, effective January 1, 1994, a legislative change in South Carolina goes into effect which redefines "violent crimes" pursuant to S.C. Code Section 16-1-60 to require that before an offense be considered a "violent crime," it must have been defined as a "violent crime" at the time of the commission of the crime. Therefore, since the "violent crime" classification was first established in 1986, there are a number of individuals who committed a second or more "violent crime" after 1986 who currently are not eligible for parole. After January 1, 1994, if the initial crime occurred prior to 1986, the inmate will now be eligible for parole consideration despite the fact that at the time of his conviction he was not eligible

In support of his request for certain instructions, the Petitioner also presented an affidavit of Robert Oldendick and survey results from random telephone polling about public opinion on the amount of time a person would have to spend in prison if sentenced to life imprisonment. (J.A. 150-159). The survey did not specifically address the precise phrase "parole," but only whether the sentence meant "they will have to spend the rest of

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because the earlier crime is no longer considered a "violent crime" under Section 16-1-60. 1993 Acts and Joint Resolutions of South Carolina, No. 184, Section 8, Section 266, Section 269, pp. 3229, 3239, 3397, 3399. This same statutory change affected the inquiry in the proceedings in Cavanaugh v. Roller, No. 92-1510, certiorari dismissed as improvidently granted. (U.S.S.Ct. November 30, 1993). Further, the description of an inmate serving a sentence of life without parole may be a misnomer. An inmate in "the second or subsequent violent offender status" of Section 24-21-640 may actually be serving a sentence of life imprisonment without a current expectation of parole consideration, subject to change throughout the duration of his life, as shown by recent statutory changes in South Carolina.

their life in prison or can they be released from prison at some point in the future" and if sentenced to life "about how much time do you think they would have to spend in prison." (J.A. 152-159). The results suggested that 20 percent in the survey thought a life-sentenced inmate would have to serve the rest of his life in prison and 71.6 percent thought he "could be released at some point," without an explanation of the variable causing the release. (J.A. 153).

Defense counsel asked the trial judge to instruct the jury on the provisions of S.C. CODE Section 24-21-640 that:

> The Board of Probation, Parole and Pardon must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction for violent crimes as defined in Section 16-1-60;

and that his earlier convictions of burglary in the first degree and criminal

sexual conduct in the first degree are violent offenses. (J.A. 21-22).

The trial judge inquired of the defense of the effect of the decision of State v. Torrence, supra, which he felt bound by and not public opinion polling. (J.A. 34). It was defense counsel's position that the state law decision in Torrence did not control this factual situation. (J.A. 35-39).

After hearing argument, the trial judge entered his Order denying the Appellant's request to charge. (R.A. pp. 1601-1607). Judge Anderson summarized the Torrence decision and concluded:

> I conclude that Torrence should be applied in this case. Therefore, it is ordered that counsel in the matter sub judice shall not engage in any discussion or reference to parole or parole eligibility or parole ineligibility.
>
> Further, this court will not instruct the jury in the initial charge. In the event that the jury inquiries about the matter, the court will use the procedure

> articulated in State v. John Foster Norris, 328 S.E.2d 3339. The instruction at that time will be as follows: 'You are instructed not to consider parole or parole eligibility. That is not a proper issue for your consideration.
>
> 'The terms "life imprisonment" and "death sentence" are to be understood in their plain and ordinary meaning.'

(J.A. 45-46).

The sentencing proceeding was then held before the jury. The prosecution introduced as evidence of the Petitioner's character the criminal conviction record of the Petitioner concerning his June 19, 1991, guilty pleas in Lexington County for criminal sexual conduct in the first degree involving the June 15, 1990, sexual battery of Estelle Simmons, a seventy-one year-old widow and also involving the August 2, 1989, sexual battery of Marie Furtick and the burglary in the first degree of Ms. Furtick's residence. (J.A. 58-60). Further, the prosecution called

witnesses to describe the physical trauma to Ms. Furtick including massive bruising and "gaping wounds to the chest and buttock area" and the victim declared she had been raped. (R.A. 1658-1659, 1668-1669). A witness described the wounds and trauma to Ms. Simmons' face resulting in her eyes being swollen shut, bruising on her hands and arms, and her statement that she had been raped. (R.A. 1672-1674). Another witness described the trauma to another of the Petitioner's elderly victims, Faris Mims, including that she had been cut and tied up by the perpetrator and that he had attempted to rape her. (R.A. 1676). Photographs of the death scene of Ms. Lamb were also presented into evidence. (R.A. 1677-1681).

In the sentencing phase, the defense sought to mitigate the impact of Simmons' violent actions by presenting a series of

witnesses who described the Petitioner as a nice kid who had been involved in his church and did not appear to be strange. (R.A. 1695-1696). Simmons' mother, family and friends testified to describe the family background and other testimony was presented that Simmons grew up in a dysfunctional family plagued with physical, sexual, and alcohol abuse. (R.A. 1870-1877). A social worker testified that his review of the records revealed he had not been a problem inmate since his arrest and based upon his interviews with him, another inmate and guards, he thought he would be adaptable to prison life. (J.A. 62-63).

Dr. James R. Evans, a psychologist, testified for the defense that Simmons suffered from a "nonspecific dissociative disorder." (J.A. 68). Also, he testified that he was in the borderline intelligence category and was severely abused

physically and sexually as a child. (J.A. 88-89). On cross-examination, the prosecution questioned the intelligence level of the Petitioner based upon earlier higher testing, that on occasion during the testing he attempted to malinger. In conclusion, the prosecution inquired:

> Q. ... Is he a dangerous and mean person?
>
> A. I think that he's dangerous and a dangerous person as long as he goes into a dissociative state, yes, sir, of course.
>
> Q. So, the answer is yes, he is a dangerous person?
>
> A. Yes, sir.

(J.A. 91-92).

In addition to other family members and friends, the defense counsel called a medical assistant from the detention center who had known Simmons since July, 1990, who described him as initially not interacting but since then he had adapted well in prison. (J.A. 94-95). Similar

testimony from two other witnesses was also stipulated. (J.A. 95).

In reply, the prosecution presented testimony contradicting the defense suggestion of a dissociative disorder. (R.A. 1978-1979, 1997-1998). Further, contrary to the conclusions of the social worker, the Petitioner's aunt and grandmother denied having incest with the Petitioner when he was a child. (R.A. 2010-2012).

Later, immediately prior to the jury instructions, the Appellant submitted Defendant's Request to Charge G which stated:

> I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that the defendant be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.

> In your deliberations, you are not to speculate that these sentences mean anything different form what I have just told you, for what I have told you is exactly what will happen to the defendant, depending on what your sentencing decision is.

(J.A. 162). The trial judge denied the charge stating:

> You lawyers are not to discuss parole or the meaning of those words. We just use them in their ordinary sense in your presentation. If there is a jury query in that regard, I'm ready to respond under my prior ruling.

(J.A. 96).

The prosecution in its closing argument asked the jury to impose the death penalty because the facts of the case spelled out a picture of a course of conduct "so bent on malice ... so lacking in compassion and social conscience." (J.A. 98). He asserted that the defense case was an attempt to shift the blame and disputed the premise of incest. (J.A. 98-

99). He reviewed his prior assaults and described the issue:

> What is the appropriate punishment for that course of conduct? And again, each one of you indicated that you feel that the death penalty is appropriate in some circumstances. Are these the proper circumstances? I submit to you if not these, then what?
>
> The second reason that you would sentence someone to death ... might be deterrence .... The fact that it will deter him is plenty. That is all we are here to do is to deter him.
>
> His own psychologist yesterday, ... Dr. Evans testified he was "dangerous." The central issue again is whether you will ignore the facts and circumstances surrounding the case and course of conduct of Jonathan Simmons ....

(J.A. 101-102). The prosecution returned in its argument to discuss the version of the criminal acts of Simmons. (J.A. 103-107). He also presented a list of mitigating circumstances that the defense will ask the jury consider but that it need not necessarily adopt them including:

> His ability to adjust and adapt to prison is a mitigating circumstance

> and he has shown no tendency against others as a mitigating circumstance. He's adapted well to prison since he's been in jail. He's treatable in prison. He's capable of helping other prisoners.

(J.A. 108-109). The prosecution observed that the jury's verdict "should be a response of society to someone who is a threat. Your verdict will be an act of self-defense." (J.A. 109-110). Then, he characterized the defense as an attempt to put the blame on society and stated that the jury is "not concerned about how he got shaped. We are concerned about what to do with him now that he is within our midst." (J.A. 110).

In their arguments, the defense immediately defended the conclusions of the dissociative disorder and the dysfunctional family. (J.A. 113-121). Counsel asserted that every prior incident of violent or abnormal conduct was directed at his father or elderly women.

> Is he dangerous? Dr. Evans said he was dangerous. But is he dangerous when he is away from these stressors that promote the dissociative behavior and, of course, he is treatable. That's even another issue. But is he dangerous? He's not going to be dangerous in a prison setting he is not going to be exposed to women.[4] He is not going to be exposed to his father. He is going to be put in an environment where he's not going to be dangerous.

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[4]This statement that he would not be exposed to women in prison was not supported by any defense evidence at trial. Furthermore, it is not supported by fact. According to the published South Carolina Department of Corrections Annual Report 1991-1992, there are 669 black female and 309 white females employed in security positions as of June 16, 1992. These positions include all uniformed personnel of correctional officers and are employed in both male, as well as female, institutions. (Annual Report, p. 88). In addition, there are 382 black females and 672 white females also employed in the prison system in non-security positions. Furthermore, upon information and belief, the current unit manager over the Petitioner's current custody in the Edisto Unit of the Broad River Correctional Institution, also known as Death Row, is a female. The comment is even more dubious when the Petitioner presented the testimony of Susan Perry, a female jail employee, about her contact with Simmons in jail in mitigation. (J.A. 92-95).

(J.A. 121). Asserting that Simmons had a mental condition and was the type of person that was "unable to cope with their sickness," defense counsel asked that he not be condemned to death but for the jury to "return a verdict of incarceration for life." (J.A. 122). The other defense counsel sought to mitigate the "don't blame Jonathan" characterization and asserted:

> We are not asking you that. Your choice is in what way is he going to be punished. That is your choice. Not that he will not be punished. And I would submit to you he is 22 years old. A life sentence is punishment.

(J.A. 125).

The trial judge charged the jury as to its sentencing responsibilities using the phrase to decide whether to sentence the defendant to life imprisonment or to death ... by electrocution." (J.A. 129). Throughout his instructions, the court used the terms "death sentence," "death,"

"death penalty," and "life imprisonment." (J.A. 134-145).

The jury subsequently began deliberating and sent out the following note from the jury:

> Judge Anderson, June 30, 1991
>
> Does the imposition of a life sentence carry with it the possibility of parole?
>
> s/James S. Wright
> Jury Foreperson

Court's Exhibit 19. (J.A. 145, 163). The jury returned to the courtroom where, over Petitioner's objection, the trial judge gave this instruction:

> Thank you, Mr. Bailiff. Mr. Foreman, I received the note and I respond as follows: ... You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

(J.A. 146). Twenty-five minutes after having its question about parole answered in this fashion, the jury returned to the courtroom with a sentence of death. (J.A. 148-150).

2. How the Supreme Court of South Carolina decided the issue presented to this Court.

In the majority opinion, the Supreme Court of South Carolina concluded that the jury instruction given in this case "satisfies in substance appellant's request for a charge on parole ineligibility." State v. Simmons, 427 S.E.2d at 179. (J.A. 170). It initially analyzed the prior decision of State v. Torrence, concluding first that (1) parole is not a proper consideration for a sentencing jury since it is not a mitigating circumstance; and (2) practical problems may arise in the application of the parole statutes. Further, Justice

Chandler's Torrence analysis relied upon the proposition of this Court in California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), that the issue of charging on parole eligibility was solely a matter of state law. Id. at 178. (J.A. 170).

The State Supreme Court concluded the issue in the following analysis:

> In State v. Davis, ___ S.C. ___, 411 S.E.2d 220 (1991), we clarified that despite our ruling in Torrence, a defendant is still entitled, upon request, to a plain meaning charge under State v. Atkins, supra. Although the trial judge erroneously declined to give a plain meaning charge upon request in this case, the error was cured when he properly followed State v. Norris, supra, in answering the jury's question regarding the possibility of parole as follows:
>
> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

> The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991); State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989). We conclude a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole. We therefore find appellant's argument without merit.

State v. Simmons, 427 S.E.2d at 179. Justice Finney dissented. 427 S.E.2d at 180.

SUMMARY OF ARGUMENT

The Petitioner was not deprived of a due process right to rebut or explain the prosecution's request for the death penalty where he was permitted to present evidence of his character for adaptability to prison life without restriction. The mere possibility that an assertion that if he was sentenced to life imprisonment that it would be without parole eligibility did not rebut or explain the state's argument for death. Nevertheless, jury instructions were given which removed the

speculation about his eligibility for parole from their deliberations. Due process does not require that a capital jury be specifically advised of parole ineligibility or the period of ineligibility.

The instructions given to not consider parole or parole eligibility and to interpret lie imprisonment in its ordinary and plain meaning did not violate the Eighth Amendment. This instruction did not prevent the jury from fully considering relevant mitigating evidence of the capital defendant's character, prior record or the circumstances of the offense. The fact that other states have developed instructions that advise capital juries of parole ineligibility does not require the Court to find either a Due Process or Eighth Amendment violation. The issue of parole eligibility or ineligibility is not a facet of the

defendant's character, prior record, or circumstance of the crime which is mitigating under the Eighth Amendment.

ARGUMENT

I. The trial court did not deprive the defendant of due process of law or violate the Eighth Amendment when it directed the capital sentencing jury not to consider parole or parole eligibility in reaching the verdict of life imprisonment or the death penalty and that the terms life imprisonment and death penalty are to be understood in their plain and ordinary meaning in response to a jury inquiry.

In California v. Ramos, 463 U.S. 992 (1983), the court declared that the Eighth and Fourteenth Amendments did not prohibit a California jury instruction regarding the Governor's power to commute a life sentence but failed to include the

Governor's power to commute a death sentence. In holding "only that the Eighth and Fourteenth Amendments do not prohibit such an instruction," the court noted that many state courts have held it improper for the jury to consider or to be informed -- through argument or instruction -- of the possibility of commutation, pardon, or parole. Id. 463 U.S. at 1012 n. 30. In such recognition, the court stated the following:

> Our conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their states should not be permitted to consider the Governor's power to commute a sentence. It is elementary the states are free to provide greater protections in their criminal justice systems than the Federal Constitution requires. We sit as judges, not as legislators, and the decision to permit juror consideration of possible commutation is best left to the states.[5]

[5]In Ramos, 463 U.S. at 1012 n. 13, the court expressly recognized the South Carolina practice by citing State v. Atkinson, 253 S.C. 531, 535, 172 S.E.2d 111, 112 (1970) ("the legislature

Id. 463 U.S. at 1013-1014. With the clear statement from this Court, states have chosen what course they would take in advising or not advising capital juries of the possibilities of various forms of release from maximum forms of correctional custody in a life sentence including pardon, parole, work release and other forms of lenient treatment from the executive branch and its role, if any, in their capital sentencing structure.[6] The

committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed.")

[6]In Lockett v. Ohio, 438 U.S. 586, 605 (1978), the court recognized there were numerous ways to modify noncapital sentences. "A variety of flexible techniques -- probation, parole, work furloughs, to name a few-- and various post conviction remedies may be available to modify an initial sentence of confinement in noncapital cases." As noted earlier, legislative changes in the law occurring after the conviction can make some benefits, such as parole, available to prisoners where it was not available at the time of their conviction. See also

interests of these states, and of the victims whose rights it must vindicate, ought not be turned aside when the states rely upon an interpretation of the Eighth Amendment approved by this Court, absent demonstration that the earlier cases were themselves a misinterpretation of some constitutional command. Johnson v. Texas, ___ U.S. ___, 113 S.Ct. 2658, 2668 (1993). Vasquez v. Hillary, 474 U.S. 254, 265-266 (1986); Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

In this particular case, South Carolina sought at trial to ensure that the sentencing jury focused its attention on relevant aggravating and mitigating circumstances by directing it upon inquiry

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1981 Acts and Joint Resolutions of South Carolina, Act 100, pp. 333-350. (Act lessened time needed to be served before parole eligibility, allowed for a pardon of a prisoner prior to parole eligibility, created new prisoner release programs defined as "supervised furlough" and "extended work release.")

not to consider parole or parole eligibility in reaching its verdict. The Eighth Amendment requires that the sentencing authority not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Skipper v. South Carolina, 476 U.S. 1, 4 (1986). Furthermore, as the court recognized in Lockett v. Ohio, 438 U.S. 586, 605 n. 12 (1978), "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." We submit that the trial court's direction not to consider parole eligibility and to consider life imprisonment and death penalty in their ordinary and plain

meaning did not violate either the Due Process Clause of the Fourteenth Amendment or the Eighth Amendment.

A. The trial court's instructions did not violate the rule of Gardner v. Florida, 430 U.S. 349 (1979).

The Petitioner contends that he was denied due process in his capital murder trial because the South Carolina trial judge refused to specifically inform the capital sentencing jury that if the jury did not reach a death sentence, the Petitioner would be sentenced to life without the possibility of parole. He contends that he was entitled to this instruction under due process of law because the prosecutor argued the Petitioner's dangerousness as a reason for death. He claims the fact that he would not be eligible for parole somehow rebutted that claim of dangerousness and he was prevented the opportunity from

making that showing. As will be shown, the state court fairly addressed that claim in concluding both that the "do not consider parole or parole eligibility" and "life imprisonment and death penalty" are to be understood in their plain and ordinary meaning" satisfied, in substance his request for a charge on parole ineligibility and that a reasonable juror would have understood the supplemental charge given that life imprisonment meant life without parole. (J.A. 146, 170-171). Further, the prosecution's argument on dangerousness of Simmons was based upon his violent acts before the jury and the testimony of the defense psychologist and was not directed toward any particularly locale or the risk of early release, but rather toward his continued existence. Contrary to the bare assertion of the Petitioner, the existence or lack of parole eligibility does not rebut his

dangerousness in general or in this record. Due process has not been violated.

In Gardner v. Florida, 430 U.S. 349 (1979), the court concluded that the Due Process Clause of the Fourteenth Amendment was violated when a judge was provided prior to the sentence with a presentence report including confidential information not disclosed to the defendant or his counsel. The trial judge imposed the death sentence rejecting the jury's advisory recommendation for life and stated he was relying upon information in the report. The court concluded that Gardner "was denied due process when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." 430 U.S. at 362.

In Skipper v. South Carolina, 476 U.S. 1 (1986), the court was faced with a

situation where the state court precluded testimony of two jailers and a visitor that the capital defendant had made a good adjustment to prison. The court concluded under the Eighth Amendment that this was relevant mitigating evidence of his character. The court noted the relevance of evidence of probable future conduct in prison as a factor in mitigation of the offense was heightened in this case because the prosecutor urged the jury to return a death sentence because he could not be trusted to behave if he were to return to prison. Since the prosecutor specifically relied upon a prediction of future dangerousness in asking for the death penalty, the court concluded that it was not only the rule of Lockett that required he be afforded an opportunity to introduce evidence on this point; "it is also the elemental due process requirement that a defendant not be sentenced to death

on the basis of information which he had no opportunity to deny or explain." Skipper, 476 U.S. at 5, n. 1. (Citing Gardner, supra, 430 U.S. 349, 362).

Due process was not violated in this case because the Petitioner was sentenced on the basis of information that he had the opportunity to either deny or explain. Clearly, the due process mandates of Gardner and Skipper were fully complied with in the sentencing proceeding. First, the state's argument for death was never that he did not pose a threat to prison staff or inmates, as the Petitioner now suggests. Rather, it was that Simmons had recently become a very violent person as shown by the violent attacks he was convicted of previously and further that the defense psychologist had admitted, that he was a dangerous person and that death would deter Simmons. (J.A. 101-102). At no time did the prosecution

allude to the possibility that Simmons would ever be subject to any custodial release or that he would ever be in the society. Since the defense psychologist testified in his opinion Simmons was "dangerous," (J.A. 91-92), clearly the prosecution's use of the phrases "threat" and the verdict as an act of "self-defense," did not deprive him of due process, where the opportunity rebut or explain was clearly presented.[7]

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[7]The Petitioner also takes out of context the prosecution's use of the phrase "in our midst" by suggesting that its use suggested the potential for release. (Brief of Petitioner 4, 15). Clearly a reasonable juror would have recognized that this comment was solely directed toward the fact that he was present to face sentencing. This "court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through the lengthy exhortation will draw that meaning from a plethora of less damaging interpretations." Boyde v. California, 494 U.S. 370, 110 S.Ct. ___, 108 L.Ed.2d 316, 332 (1990), (citing Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

In Skipper, the prosecutor violated due process when the prosecution asserted that the defendant would not behave if he were simply returned to prison but the jury was prevented from hearing evidence that he would not pose a danger if spared, but incarcerated, i.e., future adaptability to prison. Here, such evidence of the Petitioner's behavior in the jail setting and testimony about predictions of his future behavior were presented for the jury's consideration. Clearly then, unlike Skipper, the prosecution's argument of dangerousness was given the opportunity to be explained or rebutted by the defense's presentation and argument for life. (J.A. 61-63, 92-95, 121).

He contends that the effectiveness of his defense depended upon the assertion that the Petitioner was currently ineligible for parole and according to

him, would actually remain in prison if given a life sentence. (Brief of Petitioner, p. 5). The problem with the Petitioner's due process claim is that it was legally inaccurate. First, whether or not a person is parole eligible or ineligible does not explain or rebut dangerousness or prior violent crimes. The status of parole ineligibility has nothing to do with whether a particular inmate will be violent or not. Furthermore, the issue on whether a particular inmate is or is not parole eligible does not mean that he won't be dangerous or remain in prison. See State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985) (convicted murderer kills another inmate housed on Death Row); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985) (inmate on unsupervised prison work assignment delivering food to various correctional institutions murders a

female). State v. Middleton, 288 S.C. 1, 339 S.E.2d 692 (1986) (inmate escapes from prison work detail and murders two females).

Furthermore, the fact that an inmate is not parole eligible does not mean that he would never be released from prison. S.C. Code Ann. Section 24-21-940, et seq. (1989), allows the Board of Probation, Parole and Pardon Services to pardon an inmate if he can produce evidence of the most extraordinary circumstances.[8] Further, these inmates are statutorily eligible for "work release" programs. S.C. Code Section 24-13-650. But see S.C. Code Section 24-3-130 (inmates convicted

[8]Anticipated concerns about prison overcrowding with life without parole inmates have been recognized by commentators as a problem. One suggested solution was the commutation of elderly inmates serving without parole. Julian H. Wright, Jr., Life Without Parole: An Alternative to Death or Not Much of a Life at All?, 43 Vanderbilt L. Rev. 529, 563 (1990). Section 24-21-940, 970 would allow for such use of a pardon.

of criminal sexual conduct not eligible to be used on state highway projects). Testimony was presented in camera that it could not be said he would always remain behind bars. (J.A. 18). Similarly, future changes in the law might allow for parole or lessening of a custody classification to further enable similarly situated inmates to be released. See e.g. Knox v. Collins, 928 F.2d 657, 660, n. 2 (5th Cir. 1991) (Texas parole eligibility time reduced since crime).[9]

Contrary to the Petitioner's claims, the presentation on the issue of dangerousness was far from one-sided or inherently unfair. His complaint that the

[9]It has also been stated that life without parole may create "super-inmates" who without hopes of release through legal means may decide to seek freedom through illegal and violent means -- taking hostages, escaping and rioting -- placing guards and others in the prison at greater person risk and become heightened disciplinary problems. Wright, supra, n. 8, at 564-65.

use of the prior convictions as reasons to sentence him to death denied him due process because the convictions allegedly diminished any threat of similar acts of violence by him in the future is wholly inaccurate. Accepting for the sake of argument his premise that he will only hurt females, there was no evidence presented in the record that females are not located in the prison setting. To the contrary, he presented evidence that they were in the correctional setting by the testimony of the female jail employee. (J.A. 91-95). Also, evidence was presented in camera that an inmate serving a life sentence in prison could be out of the prison environment while on a furlough or work release and the statutory laws do not prohibit an inmate without parole eligibility from being on these programs. (J.A. 15-17). Also, he was able, unlike Skipper, to attempt to make a presentation

of non-violence in the prison and adaptability to prison. Also, the Petitioner was able to argue to the jury that he is going to be put in a prison setting and will not be dangerous because he will not be exposed to the stressors that caused the violence. (J.A. 121). His opportunity to rebut or explain was not denied.

B. The trial judge's answer to the jury's parole inquiry was appropriate.

During the deliberations, the jury sent out an inquiry asking "does the imposition of a life sentence carry with it the possibility of parole." (J.A. 145, 163). The trial judge responded in accordance with South Carolina law as follows:

> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence

> are to be understood in their plain and ordinary meaning. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

(J.A. 146). The Petitioner contends that the trial court's response to the jury inquiry was confusing and created a reasonable likelihood that the jury would not have properly understood or followed the instruction under the Boyde v. California, 494 U.S. 370, 380 (1990) test. The Supreme Court of South Carolina properly analyzed the instructions and rejected his claim of due process violation.

1. The cautionary instruction.

In the first two sentences of the trial court's response, the judge specifically instructed the jury "not to consider parole or parole eligibility in reaching your verdict ... that is not a proper issue for your consideration.." He asserts that because of this instruction

not to consider parole or parole eligibility, that the jury was told there was parole eligibility and rejected the direction and considered parole, relying upon dicta in State v. Smith, 298 S.C. 482, 381 S.E.2d 724 (1989). The reliance upon Smith by the Petitioner is misplaced because his current attempt to parcel the sentences or words in isolation ignores their impact in the context they were given. First, the Petitioner left out of his recitation of the Smith case the fact that "neither the Johnson jury nor the Plemmons jury was instructed, as was Smith's jury that "life imprisonment was to be understood in its ordinary and plain meaning." State v. Smith, 381 S.E.2d at 727. Further, the court stated from the instruction "the only logical conclusion available to the reasonable juror from the court's instructions was that Smith would

not be parole eligible if sentenced to life in prison." Id.

This cautionary instruction not to consider parole or parole eligibility, matters not presented in evidence, in a jury's deliberation was sufficiently specific to address the inquiry about whether Simmons would be eligible for parole. A reviewing court will normally presume that a jury will follow an instruction to disregard inadmissible evidence, Greer v. Miller, 483 U.S. 756, 766 (1987), unless there is an overwhelming probability that the jury would be unable to follow the court's instructions,, Richardson v. Marsh, 481 U.S. 200 (1987), and a strong likelihood that the effect of the disregarded evidence would be "devastating" to the defendant, Bruton v. United States, 391 U.S. 123 (1968). Accord U.S. v. Jones, 907 F.2d 456 (4th Cir. 1990).

We submit there is no reason to believe, as Petitioner suggests, that after the instructions to disregard parole that the jury was incapable of obeying the instructions. Other courts have reasonably concluded that similar instructions not to consider parole would be followed. In King v. Lynaugh, 850 F.2d 1055, 1060 (5th Cir. 1988), the court evaluated a similar cautionary instruction and concluded:

> The state aptly characterizes this instruction as stating "life means life." If the jurors paid attention during voir dire and followed the trial court's charge, as we generally presume they do, any pre-existing misconception about parole law would have been ignored.

Similarly, in State v. Robbins, 319 N.C. 465, 356 S.E.2d 279 (1987), the North Carolina court concluded under a virtually identical situation a similar cautionary instruction upon a jury inquiry on parole would have been followed by the jury.

Accord Quick v. State, 353 S.E.2d 497, 503 (Ga. 1987); Commonwealth v. Strong, 563 A.2d 479, 486 (Pa. 1989); Jones v. State, 843 S.W.2d 487, 495 (Tex. Cr. App. 1992); Peterson v. Murray, 904 F.2d 882, 886 (4th Cir. 1990); Andrade v. McCotter,, 805 F.2d 1190, 1192 (5th Cir. 1986). Cf. People v. Gordon, 792 P.2d 251 (Cal. 1990) (defendant not entitled to an instruction that life without parole meant he would remain in prison his entire life).

The jury was directly instructed not to consider parole or parole eligibility in its continued deliberation. There is no cognizable reason to conclude these "do not consider" instructions were being ignored by the jury in every case it has been given. Simply put, the Supreme Court of South Carolina was correct in concluding the jury heeded this instruction, as well as the other

instructions, and fairly sentenced Simmons disregarding parole.

2. The "plain and ordinary meaning" instruction.

The Petitioner assumes that the jury will ignore the initial sentences of the cautionary instruction not to consider parole or parole eligibility and will consider parole in determining life imprisonment and the death sentence in their "plain and ordinary meaning." His logic is faulty on a number of grounds. First, the jury is presumed to follow the clear and specific instructions not to consider parole or parole eligibility as set forth in the previous section. Second, the Petitioner is clearly misapplying the standard of Boyde v. California, supra, in its inquiry about the instructions. As the court in Boyde stated:

> Jurors do not sit in solitary isolation booths passing

> instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in light of all that has taken place at trial likely to prevail over technical hairsplitting.

Boyde,, 108 L.Ed. at 329. The Boyde "reasonable likelihood" standard rejects a test of how a single hypothetical "reasonable" juror could or might have interpreted the instruction. Rather the standard is whether or not there is a reasonable likelihood that the jurors in the Petitioner's case rejected the directive from the court not to consider parole eligibility in its conclusion and instead sentence the Petitioner to death without considering relevant mitigating evidence. The test under Boyde is not to engage in technical parsing of the language of the instructions but instead to approach the instruction as a jury

would -- with a commonsense understanding of the instructions in the light of all that has taken place. Johnson v. Texas, 113 S.Ct. 2658, 2669 (1993). Clearly, the constitutional test is not whether the court gave the best or clearest instructions. Here, in light of the fact that the concept of parole was wholly left out of any evidentiary presentation, argument of counsel, or initial instruction by the court, the subsequent inquiry about parole eligibility and the trial court's strong response that it should not consider parole eligibility and to consider a life sentence in its plain and ordinary meaning would have led the jury to treat the life sentence as life imprisonment without consideration of parole eligibility, i.e., "life means life." King v. Lynaugh, 850 F.2d 1055, 1060 (5th Cir. 1988). The Supreme Court of South Carolina's analysis was sound.

a. Public opinion and jury surveys.

Simmons seeks to bolster his assertion of jury misunderstanding by the use of public opinion polls and juror surveys on what he purports to be the meaning of life. This course is neither persuasive nor relevant to this Court's interpretation under Boyde as to how the actual jurors would have interpreted the instructions. Prior expert analysis of jury instructions in attempts to demonstrate how a reasonable juror would have interpreted instructions or concepts is simply not relevant. In rejecting a similar attempted showing of various experts concerning an interpretation of mitigating instructions in a North Carolina capital case, the Fourth Circuit cogently stated:

> We agree with the district court that the proffered affidavits were not relevant to the determination of the constitutionality of the instructions. The interpreta-

> tion of instructions given by seven academics, employed eight years after the trial, are irrelevant. The result of a test given North Carolina would not enlighten the court as to how North Carolina would not enlighten the court as to how a reasonable juror, who had heard three weeks of testimony, jury arguments from the attorneys, and the complete charge of the judge, would have interpreted a few sentences in the charge.

MacDougall v. Dixon, 921 F.2d 518, 532-533 (4th Cir. 1990). Accord Jeffries v. Blodgett, 988 F.2d 923, 931 (9th Cir. 1993).

It has never been a function of any "reasonable likelihood" analysis of jury instructions to engage social science expertise on how the jury decided the case. An element of our jury system has been insulation from how juries actually decide cases. Jurors may not come and impeach their verdict by assertions of uninformed deliberations. Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993). Courts invoke a presumption that

jurors understand and follow their instructions. See Parker v. Randolph, 442 U.S. 62, 73 (1979) (plurality opinion) ("A critical assumption underlying the system of trial by jury is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.") See Francis v. Franklin, 471 U.S. 307, 324-25, n. 9 (1985).

The Seventh Circuit rejected a study of potential jurors interpretation of facts and instructions in Gacy v. Welborn, supra. In concluding that the use of such studies to evaluate and challenge instructions (or overrule prior precedent) was baseless, the court concluded:

> As there are no perfect trials, so there are no perfect instructions. How best to convey the law to lay persons

> sitting on juries is in the end a question for state legislatures and trial courts to resolve .... The jury is a means to resolve disputes, not a waystation by which the controversy at trial is transported to a higher level of generality as a social science dispute about juries. Gacy's jury was instructed within the wide bounds set by the Constitution.

Gacy, 994 F.2d at 312. The test is not whether the instructions given could have been better or more accurate, but whether they complied with the Constitution. See e.g. Mu'Min v. Virginia, ___ U.S. ___, 111 S.Ct. 1899, 1905 (1991) ("to be constitutionally compelled, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these particular questions must render the defendant's trial fundamentally unfair.") This Court should not turn the responsibility in reviewing instructions for constitutionality to social scientists or public opinion

surveys. It clearly has not allowed for it to be done in the past. Gacy, supra, at 314. The Boyde test adequately addresses the issue.

As stated previously, the public opinion survey submitted at trial failed in two critical areas -- it failed to distinguish between the tested item of "release" with the untested item of parole or parole eligibility and it failed to address the issue presented as to how the same testers would have responded if they received the jury instruction given of "do not consider parole and parole eligibility and life imprisonment and death sentence are to be understood in their plain and ordinary meaning." (J.A. 145, 153-159). Even without the ameliorating language, over 20 percent initially responded that he would have to spend the rest of his life in prison as opposed to being released [not paroled]. (J.A. 153).

The Petitioner's reliance upon the results of the survey of Theodore Eisenburg and Martin T. Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 Cornell L.Rev. 1 (Nov. 1993), is even more misleading. This purports to be a survey of 114 actual jurors drawn from 31 cases tried between 1986 and 1992. Despite not having results from the remainder of the 372 jurors, he purports to use it to show that jurors misunderstand the concept of life imprisonment. What, in fact, it may show is that the jurors recognize that there were alternatives to parole available for earlier "release" from close confinement and does not support his underlying due process claim. This is because, again, the particular instructions the jurors received were not used in the analysis. This is critical because in South Carolina from August 24, 1987, to May 20, 1991,

South Carolina capital jurors could have been told about specific parole eligibility of either 20 years or 30 years for an inmate sentenced to life. See State v. Atkins, 293 S.C. 294, 360 S.E.2d 302, 305-306 (1987); State v. Torrence, 305 S.C. 45, 405 S.E.2d 315 (1991). Simply put, these tested pools of jurors may have been instructed on parole ineligibility for either 20 or 30 years. To now assert they misunderstood the meaning of life in their case is without foundation. His reliance on such speculation, other cases (or lack of memory) should not be used to undermine the clear, accurate, and possibly different instructions in this case.[10]

[10]The use of national public opinion surveys is even less useful to suggest that this set of jurors would have understood the instructions to mean life imprisonment until parole. See e.g., Frank A. Benneck, Jr., The Public, The Media, and the Judicial System, 7 State Ct. 4, 10 (1983). (Article states that "most Americans know that if a convicted

The use of public opinion surveys or jury polls ignore the appropriate standard of review for ambiguous jury instructions in Boyde. Here, the jury was given a response to their inquiry about the possibility of parole which clearly apprised them to not consider parole eligibility and treat life imprisonment in its plain and ordinary meaning. The survey of other jurors or the public at large is not relevant making that decision where they were not exposed to the same trial, argument, or instructions. This

criminal receives a life sentence," he will not necessarily spend the remaining years of his life in prison." Also, it reveals that public opinion suggests that 45 percent of the public think a district attorney's job is to defend an accused criminal who cannot afford a lawyer. Also, it suggests that 81% of the public think once someone is convicted he can always appeal his case. Cf. Caldwell v. Mississippi, 472 U.S. 320 (1985).)

Court should not rest its decision on such speculative results.[11]

2. The instruction in context did not deny due process.

In conclusion, the instruction given after the jurors' inquiry did not deprive Simmons of due process of law. The state trial judge, in accordance with state law, precluded the state and the defense from injecting the specter of parole or early release into the sentencing proceeding. When the Petitioner's dangerousness was presented through his past violent conduct, the Petitioner was able to either

[11]The Petitioner further seeks to glean some interpretation of a life sentence from earlier legislative debate on whether to increase parole eligibility for murder from 20 years to 30 years or without parole. It reveals nothing as to this instructional issue except that there were divergent feelings on the death penalty and the establishment of parole. Rather, it would reveal that when a person has a violent prior conviction, like Simmons, he would not be eligible for parole since it enacted S.C. Code Section 24-21-640.

explain through expert testimony or deny. the proffered rebuttal of parole ineligibility did not rebut dangerousness.

Further, the proper preclusion by the trial court of the concept of parole similarly prevented the prosecution from suggesting possibility of release through correctional programs, pardons, escape, or an act of the court system. Clearly, he was not denied the opportunity to explain. Further, after the jury made its request, the instruction clearly suggested to the jury that life meant life imprisonment and it was not to consider parole eligibility. (J.A. 170-171). This plain response complied with state law and addressed the issue. His claim to the contrary is without support.

The Petitioner further seeks to suggest some improper motive on the prosecution's position at trial concerning the propriety of the plain meaning

instructions as opposed to the Petitioner's requested instruction. It cannot be questioned that the State, at trial as well as in the appeal, was asserting compliance with state law and procedure as established in State v. Matthews, supra, and State v. Torrence, supra. The proper state procedure was that parole and parole ineligibility should not be injected by the parties in a capital trial and that after Torrence, the plain meaning instruction was the appropriate instruction.

Due process was not denied because the jury was given accurate information -- that life imprisonment was to be understood in its plain and ordinary meaning, i.e., life means life. The jury was never told by the judge or the prosecutor that life meant life with parole eligibility. In fact, the jury was

told just the opposite -- do not consider parole eligibility.

The timing of the instructional request by the jury cannot lead to a different conclusion. He asserts that because the jury asked the question about parole during its deliberations, "the jury had likely concluded that a no parole-eligible sentence could adequately protect society." (Brief of Petitioner, p. 27). How he comes to this speculative belief and reasoning is not supported by the record. All that the court can legitimately gather is that the question was asked and the court's response was given. It can also be assumed that the response was given before the jury rendered its verdict and applied the law as given.[12]

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[12]In State v. Bey, 610 A.2d 814, 841 (N.J. 1992), the state court found no error in delay in answering question about a capital defendant's potential for parole eligibility where jury returned verdict of

II. The Eighth Amendment does not entitle a capital defendant to be informed of his ineligibility for parole which does not relate to his character, prior record, or the circumstances of the crime.

In the earlier argument, the Respondent asserted that the jury instructions properly advised the capital defendant that his sentence of life imprisonment meant life in its ordinary and plain meaning. The jury received accurate information and did not consider parole. The resolution should also remove the basis for his argument under the Eighth Amendment since the jury received in substance what he requested. For this threshold reason, the assertion under the Eighth Amendment must be denied.

Assuming arguendo that the issue remains, we submit that an analysis of

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death without the answer to its parole question.

Lockett v. Ohio, supra, does not mandate that a jury be apprised that it can consider the precise terms of the sentence, here arguably life imprisonment with the possibility of parole, as a relevant mitigating evidence to render a "reasoned moral response."

A. Lockett v. Ohio and the development of relevant mitigating evidence.

In Lockett v. Ohio, 438 U.S. 586 (1978), the court was faced for the first time with considering in a capital case which facets of an offender or his offense is deemed "relevant" in capital sentencing and what degree of consideration of "relevant facts" it would require. The court concluded "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any

aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. 438 U.S. at 605. The court noted importantly that nothing it said limited the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense. Id. 483 U.S. at 605 n. 12. The court determined that the Eighth Amendment was violated because it limited the desirable function of individualized sentencing. The Ohio statute prevented the sentencer in a capital case from giving independent mitigating weight to aspects of the defendant's character and record and to the circumstances of the offense proffered in mitigation. Particularly, the Ohio statute had limited mitigation to only three specified factors

-- whether the victim induced or facilitated the offense, whether the defendant acted under duress or coercion, and whether the murder was the product of mental deficiency. The court concluded that if any of these were not found, the law mandated the death sentence. Id. at 608. The court concluded that the Eighth Amendment was violated because these statutory factors would not have allowed relevant mitigating evidence to be considered to affect the sentencing decision which was presented at the trial -- the absence of direct proof that the defendant intended to cause the death of the victim, consideration of her relatively minor role in the offense, and her age (twenty-one years old). Id. at 608. The court concluded that the limited range of statutory mitigating circumstances which could be considered under Ohio law was incompatible with the

Eighth Amendment. The court stated: "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."

Similarly, in Woodson v. North Carolina, 428 U.S. 2280 (1976), the plurality of this Court held that a mandatory death penalty was not a permissible response to the problem of arbitrary jury discretion because it lacked individualized sentencing. It stated "the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. at 304.

The rule in Lockett derived from this Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By focusing the sentencer on the characteristics of the offender who committed the crime, the court concluded that justice requires that there be taken into account the circumstances of the offense and the character and propensity of the offender. This will lead to a proper consistency and reliability in the process according to the Court.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the court applied the rule of Lockett to strike down a conviction where it concluded the sentencer was precluded from considering relevant mitigating evidence -- the defendant's violent family background -- and the appellate court supported it by concluding that the family background evidence was not relevant

because it did not tend to provide a legal excuse from criminal responsibility. Id. at 113. The court concluded that the evidence Eddings offered was relevant mitigating evidence. The court noted his youth of sixteen years, evidence of a difficult family history including beatings from a harsh father, and a severe emotional disturbance described as a sociopathic or antisocial personality, as the relevant evidence. Id. at 115.

The court returned to the question of what is relevant evidence in mitigation is accessing a defendant's role in the circumstances of the crime in Enmund v. Florida, 458 U.S. 782 (1982). In reliance on Lockett, the court noted the difference between those who actually killed and robbed and the other participants. "The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on

individualized consideration as a constitutional requirement ... which means that we must focus on the relevant facets of the character and record of the individual offender." Id. at 798.

The rule of Lockett was applied in Skipper v. South Carolina, 476 U.S. 1 (1986), to conclude that the defendant was entitled to a new trial because evidence of his adaptability to prison was relevant mitigating evidence. The particular evidence the court deemed to be relevant under Lockett was evidence that he had been a well-behaved and well-adjusted prisoner for the seven months and favorable inferences could have been drawn regarding his character and probable future conduct if sentenced to life in prison. The court concluded "there is no question but that such inferences would be"mitigating" in the sense that they might serve "as a basis for a sentence

less than death." Id. at 5 (citing Lockett).

Recognizing that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose," the court in Skipper determined that evidence of past conduct as indicative of future conduct as an inmate was not an undesirable element of criminal sentencing. Further, since evidence that a defendant would pose a danger in the future to the community if not executed, may be an aggravating factor, the court concluded that evidence that the prisoner would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under Eddings, such evidence may not be excluded from the sentencer's consideration. The court stated that the evidence was admissible for the purpose of showing the

jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment. Id. at 7. The court did note that not all facets of a defendant's ability to adjust to prison life are relevant and mitigating. Id. at n.2 (evidence of personal hygiene is irrelevant).

In Hitchcock v. Dugger, 481 U.S. 393 (1987), the court concluded that a Florida advisory jury in a capital case was precluded from considering and the sentencing judge refused to consider evidence of nonstatutory mitigating circumstances. Despite the presentation of evidence in mitigation that the defendant, as a child habitually inhaled gasoline, that his mind wandered, that he came from a large and poor family whose father had died and that he was

affectionate to his family and argument that his youth, lack of prior criminal or violent behavior, his potential for rehabilitation and surrender to authorities, the court found the rule of Lockett was violated because the trial court limited its consideration to the certain enumerated statutory mitigating circumstances which did not include consideration of any of the evidence other than his youth. Relying, upon Skipper, supra, the court concluded that the death sentence was invalid.

Similarly, in Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716 (1987), the court concluded that the rule of Lockett was again violated by a Nevada law that established a mandatory sentence of death for a prisoner who was currently serving a sentence of life without the possibility of parole and was convicted of a murder while serving that sentence. In Shuman,

the prior sentence of life without parole was not suggested to carry the classification of "relevant mitigating circumstance" which could have continued if again sentenced to life. To the contrary, it suggested that the "life-term inmate" designation did not reveal anything about the inmate's character and moral culpability which may vary depending upon the circumstances of the offense and characteristics of the defendant such as youth, the influence of drugs or emotional disturbance upon his behavior, and circumstances in the conduct which he may believe provided a moral justification for the conduct. Id. 107 S.Ct. at 2726-27. "In Shuman's case, a sentencing authority may find relevant his behavior during his fifteen years of incarceration, including whether the inmate murder was an isolated incident." Id. The court also noted that there was no reason to believe that

listed statutory mitigating circumstances in Nevada (which did not specify a sentence of life without parole as mitigating, could not be applicable to Shuman's situation. Pertinent to the argument in this case, the court noted that a "sentence of life with possibility of parole may not ultimately mean in Nevada what it seems to say." Id. 107 S.Ct. 2726 n. 11. The court noted that some inmates who had been sentenced earlier to life without parole were, in fact, currently on parole or had their sentences commuted by a Pardon Board. The court stated that it "did not mean to suggest that such a program is not appropriate, it does indicate, however, that in some cases a prison's rehabilitative efforts appear to yield positive results." Id. Whatever the merits of the court's social analysis, it acknowledged the fact that "most life-term

inmates in this country have a realistic expectation of parole." Id. (citing Acker, Mandatory Capital Punishment for the Life Term Inmate Who Commits Murder, 11 New England J. Crim. and Civ. Confinement 267 at 321-324 and 289 n. 14).

In Franklin v. Lynaugh, 487 U.S. 164 (1988), the court concluded that "lingering doubts" or "residual doubts" about a capital defendant's guilt were not constitutionally relevant mitigating evidence. The plurality determined that the rule of Lockett on relevant mitigating evidence did not "mandate reconsideration by capital sentencing juries of their residual doubts over a defendant's guilt.

> Such lingering doubts are not over any aspect of the defendant's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

Id. at 174. In her concurring opinion, Justice O'Connor asserted that the Court had defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the offense, that may call for a penalty less than death. Id. at 188 (O'Connor, J., concurring) ("residual doubt" is not a fact about the defendant or the circumstances of the crime). Further, the fact that some states had adopted capital sentencing procedures that allowed defendants to enjoy the benefit of doubts that linger from the guilt phase of the trial did not make such a presentation constitutionally required. Id. at 173, 188.

The rule of Lockett was again addressed in Penry v. Lynaugh, 492 U.S. 302 (1989), where the court concluded the particular instructions given to the jury did not allow for the jury to consider and

give effect to the mitigating evidence of the defendant's mental retardation and abused background. The Eighth Amendment was violated because the jury was not provided with a vehicle for expressing its "reasoned moral response" to the mitigating evidence concerning his "character or record or the circumstances of the offense." Penry, supra, 109 S.Ct. 2947-2952.

In Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990), the court concluded that California instructions did not prevent consideration of relevant mitigating evidence. The court found that the catch-all circumstance allowed for consideration of his character, including his evidence that he had won a prison dance contest to suggest that he could live a useful life behind bars and was artistic. 110 S.Ct. 1199 n. 5. See also Blystone v. Pennsylvania, 494 U.S. 299

(1990). In Johnson v. Texas, 113 S.Ct. 2658 (1993), the court held that the Texas pattern instruction on future dangerousness based on probability of violence constituting a continuing threat to society allowed for adequate consideration under Lockett of the defendant's youth. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and reckless that may dominate in younger years can subside," according to the court. Id. 113 S.Ct. at 2669. The court, however, recognized that the fact that some jurors may view the fact of youth as aggravating rather than mitigating did not mean the rule of Lockett was violated. The issue under the Eighth Amendment was whether the mitigating evidence is "within the effective reach of the sentencer." Id.

(citing Graham v. Collins, 113 S.Ct. 892 at 901).

B. The application of Lockett and the exclusion of defense offered evidence.

In Lockett, the court acknowledged that evidence not bearing on a defendant's character, prior record, or circumstances, may, consistent with the Eighth Amendment, be excluded is irrelevant. Both state and federal courts, applying the Lockett rule, have equally recognized that the Eighth Amendment is not violated every time one state reaches a different conclusion from a majority of its sister states over how best to administer its laws. Spanziano v. Florida, 468 U.S. 447, 464 (1984). As the court has several times stated, it is unwilling to say that there is any one right way for a state to set up its capital sentencing scheme. Id. See California v. Ramos, supra. The court recognized that the fact that some states

allow for "lingering doubt" evidence did not mean that its exclusion in some state sentencing schemes violated the Eighth Amendment. Franklin v. Lynaugh, supra, 487 U.S. at 176-177.

Courts have refused under Lockett to accept capital defendant's characterization of some evidence as mitigating or relevant in its own sentencing structure where the evidence did not focus upon the character of the particular defendant, his prior record, or the circumstances of the crime. For example, courts have rejected the following evidence as irrelevant: pain associated with execution, Swindler v. Lockhart, 693 F.Supp. 760 (E.D. Ark. 1988); Shriner v. Wainwright, 715 F.2d 1452, 1456 (11th Cir. 1983), a minister's opinion on biblical teachings and ethical considerations about the death penalty, Evans v. Thigpen, 631 F.Supp. 274 (S.D.

Miss. 1986); evidence of a co-defendant's plea bargain or life sentence, Brogdon v. Blackburn, 790 F.2d 1164 (5th Cir. 1986); People v. Dyer, 753 P.2d 1, 26-27 (Cal. 1988); People v. Page, 620 N.E.2d 339 (Ill. 1993); lack of deterrent value of sentence, Granviel v. Lynaugh, 881 F.2d 185 (5th Cir. 1989); evidence that the same defendant had pled guilty to an unrelated murder and received a life sentence, Evans v. McCotter, 790 F.2d 1232 (5th Cir. 1986); a journalist's testimony in opposition to the death penalty, Scott v. Dugger, 891 F.2d 800, 806 (11th Cir. 1989).

These cases generally recognized the role and right of the state court to establish rules governing the admission of relevant mitigating evidence. Generally looking at whether the proffered evidence relates to a defendant's prior record, character, or the circumstances of the

offense, the courts will make their determination as to whether the evidence is constitutionally relevant under Lockett and Skipper.

C. Evidence of parole or parole ineligibility is not relevant mitigating evidence pursuant to Lockett.

In California v. Ramos, supra, the court recognized a principle of deference to the state courts and legislatures. In holding that the Eighth Amendment did not prohibit instructions that do advise capital juries of clemency, it also stated that the decision was not intended to override the contrary judgment of many states that do not permit the jury to be apprised of parole possibilities. Id. 463 U.S. at 1014. As the court stated, it is elementary that states are free to provide greater protection than the Eighth Amendment requires. The fact that South Carolina, as well as other states, may

have chosen not to do so does not create a cognizable Eighth Amendment violation.

Parole ineligibility or eligibility is irrelevant under Lockett and Eddings to the capital sentencing process because it does not evidence the particular defendant's prior record, personal characteristics, or the circumstances of the crime. Accord King v. Dugger, 555 So.2d 355, 359 (Fla. 1990), People v. Coleman, 544 N.E.2d 330 (Ill. 1989); State v. Robbins, 356 S.E.2d 279 (N.C. 1987); Commonwealth v. Henry, 569 A.2d 929, 941 (Pa. 1990); State v. Torrence, supra, 406 S.E.2d at 323 (S.C. 1991); Quick v. State, 353 S.E.2d 497 (Ga. 1987); State v. Copeland, 530 So. 2d 526 (La. 1988); Mueller v. Commonwealth, 422 S.E.2d 380 (Va. 1992); Peterson v. Murray, 904 F.2d 882, 886-87 (4th Cir. 1990); O'Bryan v. Estelle, 714 F.2d 365, 388-89 (5th Cir. 1983). See e.g., U.S. v. Chandler, 996

F.2d 1073 (11th Cir. 1993) (Skipper does not require federal capital jury to be advised of sentencing possibility of life without possibility of parole).

The Petitioner's argument that parole ineligibility or that parole itself is a mitigating circumstance under Lockett is misplaced. He claims that parole ineligibility is an integral part of his Skipper evidence of future adaptability to prison life. Since the jury was not instructed on his ineligibility for parole it somehow minimized the significance that the jury would have accorded to his alleged probability of good behavior in prison. Apparently, this is based upon his suggestion that he would remain in prison through the duration of his life.

While we contend the instructions given to the jury accurately portrayed life imprisonment as life in prison, the picture the Petitioner seeks to suggest to

capital juries would be inherently misleading. First and foremost, at the time of the trial, no state agency had ever determined that Simmons was going to be serving a sentence of life without the possibility of parole, despite the fact that he had earlier pled guilty and been sentenced to a violent crime prior to this trial. The importance of that distinction is that the power to make that determination did not rest with the judiciary, but was solely vested in an executive branch agency, the South Carolina Board of Probation, Parole and Pardon Services. State v. McKay, 300 S.C. 113, 386 S.E.2d 623 (1991) (proper for the trial court to refuse to determine whether earlier violent offense conviction was part of one continuous course of conduct). Accord Williams v. Commonwealth, supra; Torrence, supra, 406 S.E.2d at 323 ("there is no way [for the court] to be assured

that the Parole Board would reach the same conclusion as the court [on questions of parole ineligibility]".)

Assuming he would, in fact, be ineligible for parole, that fact does not mean in South Carolina that he would never be "released" behind the prison walls. As noted earlier, life inmates are statutorily eligible for many correctional programs which allow for contact beyond the prison community.[13]Such programs as "work-release," unsupervised furloughs at the discretion of the Commissioner of Corrections, pursuant to S.C. Code Section

[13]On October 6, 1993, a compromise agreement to modify a federal court decree concerning conditions of confinement in the South Carolina prison system was filed in Harry Plyler et al. v. Parker Evatt et al., 82-876-2 (D.S.C.). The agreement, in part, would specifically allow inmates serving a sentence of life without parole to be eligible after ten years to a reduced custody classification that would enable them to be on state or publicly controlled property, such as public State House grounds. The propriety of the agreement remains in litigation.

24-3-210, suggest that life imprisonment in South Carolina may not mean being inside a prison for life. (J.A. 10-18). Further, it is recognized that life inmates are eligible, upon a proper showing for a pardon from the Parole Board. Also, during the term of their imprisonment, changes in law may occur which create parole eligibility where it did not exist previously.[14]

The critical point, however, is that South Carolina's determination that parole ineligibility is not a mitigating factor. The issue of parole eligibility or ineligibility is no more relevant under Lockett's test of character of the defendant, prior record, or circumstances of the crime than is the particular correctional facility or location that an inmate may be housed in if sentenced to

[14]See n. 3, Knox v. Collins, supra, 928 F.2d 660, n. 2.

life. The terms of the sentence of confinement do not reflect upon an inmate's dangerousness or nondangerousness.

The Petitioner would create a situation which would be inaccurate by suggesting parole ineligibility means an inmate will never be outside the prison in order to support his assertion that it is "mitigating." This inaccurate picture could lead to unreliable results which South Carolina has sought to avoid by its "plain meaning" instruction. Accepting his argument, a jury in a joint murder trial would find a benefit to a non-parole defendant due to a prior violent crime record over a parole eligible defendant who had no criminal record despite similar roles in the murder. The absurdity of this argument is that while both inmates may receive a life sentence, even the parole eligible defendant may <u>never</u> be

released on parole due to the circumstances of the crime since there is no presumptive parole. S.C. Code Section 24-21-640 (1989). Further, accepting his premise would also suggest that a jury would be more likely to sentence the parole-eligible inmate to death than the no-parole inmate with their similar roles. Similarly, what proper instruction would be made if the defendant offered never to seek parole if sentenced to life? The instructions given in this case, however, would properly focus the jury's attention solely to the characteristics and background of each defendant, their prior record, and his respective role in the crime.

Here, the jury instructions not to consider parole or parole eligibility and to consider life imprisonment and the death sentence in their ordinary and plain meaning provided the jury with proper

guidance to ensure that they would properly consider relevant mitigating evidence presented at the trial, including whether Simmons was adaptable to prison life. The instructions additionally followed the policy of a large number of states to assist defendants by forbidding a jury to increase its punishment by anticipation about forms of clemency.

Although Lockett and Eddings prevent a state from placing relevant mitigating evidence "beyond the effective reach of the sentencer .. those ... do not bar a state from guiding the sentencer's consideration of mitigating evidence." Johnson v. Texas, supra, 113 S.Ct. at 2666. "There is no constitutional requirement of unfettered sentencing discretion in the jury, and states are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable

administration of the death penalty." Boyde v. California, supra, 494 U.S. 370, 377.

The approach taken by South Carolina properly allowed for the more rational and equitable administration of the death penalty by the use of the challenged instructions in this case. The information provided to the jury was accurate information. As recently as 1990, it was reported that twenty-six jurisdictions, relying upon Ramos, had determined that the jury should not consider the possibility of parole, pardon, or commutation. State v. Hightower, 577 A.2d 99, 117 (N.J. 1990), citing People v. Ramos, 689 P.2d 430, 442 n. 10 (1984). Other state instructions that may provide specific information on parole, as South Carolina previously did, frequently are based purely on state law grounds. See Mackbee v. State, 575 So.2d

16, 38 n. 11 (Miss. 1990). The Petitioner's desire to revise South Carolina's practice purely because an alleged majority of other states may do it differently is the diversity among the state's that Ramos found permissible. Accord Spanziano v. Florida,supra. There is no constitutional requirement that "procedures involved in imposing the death sentence ... be structured to favor a defendant." Rook v. Rice, 783 F.2d 401, 406 (4th Cir. 1986). Here, neither the order of the instructions about parole and life imprisonment nor the language in the challenged instruction prevented the jury from making an individualized determination as to whether Simmons should be sentenced to life or death based upon his character, prior record, or the circumstances of his offense. The rule of Lockett has been applied.

Respondent would submit that this case may also bring to focus again why this Court's jurisprudence under Lockett has laid traps for unwary states, and is generating a fundamental uncertainty in the law that shows no signs of ending or even diminishing. See Walton v. Arizona, 497 U.S. 639, 656 (1990) (Scalia, J., concurring in part and concurring in judgment). Here, the South Carolina court sought to channel the sentencing jury's discretion toward the relevant mitigating evidence presented about Simmons character, prior record, and crimes. To reject this Court's earlier mandate under Ramos and conclude that the nature of parole ineligibility is a "mitigating" circumstance, despite the fact that has no relation to the character of the defendant or the circumstances of the crime would not lead to the "important additional safeguard against arbitrariness" and the

"reasoned moral response" in capital sentencing that the states have been encouraged to adopt. In conclusion, we encourage this Court not to take that step which is neither warranted nor necessary.

CONCLUSION

For all the foregoing reasons, the judgment of the South Carolina Supreme Court should be affirmed.

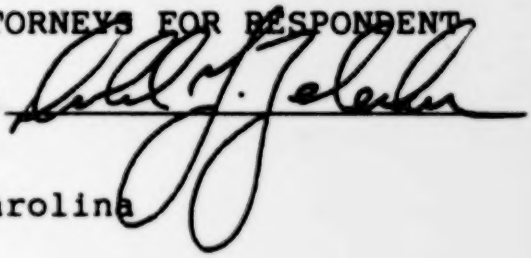
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By: 

December 13, 1993
Columbia, South Carolina

DEC 27 1993

No. 92-9059

In The

Supreme Court of the United States

October Term, 1993

JONATHAN DALE SIMMONS,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of South Carolina

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ARGUMENT IN REPLY

The only matters in the briefs of respondent and its *amici* that require reply are the following potentially misleading statements of fact and law.

> 1. *"First and foremost, at the time of trial, no state agency had ever determined that Simmons was going to be serving a sentence of life imprisonment without the possibility of parole."* Brief of Respondent at 95.

This assertion, though technically true, is irrelevant. Petitioner's ineligibility for parole is unequivocally established as a matter of South Carolina statutory law. S.C. Code Ann. § 24-21-640 (1993 Supp.); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315, 320 (1991). Presumably because no ambiguity about petitioner's actual ineligibility exists in this case, respondent did not question petitioner's ineligibility for parole at trial, on appeal, or in its brief opposing the petition for writ of certiorari, Sup.Ct.R. 15.1, and there is no basis upon which to do so now.[1]

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[1] In a related vein, respondent also urges that the trial judge had no obligation to instruct the jury on the law governing its "life imprisonment" alternative because South Carolina's parole laws – like all human law – might change in the future. Brief of Respondent at 16, 37, 49, 97. This proves too much, since respondent's reasoning would destroy the legal basis of trial by jury, and would transform capital sentencing proceedings into something approaching lawless vigilantism, in which the only guidepost for the jury's sentencing discretion would be the irreversibility of death. *Cf. Gregg v. Georgia*, 428 U.S. 153 (1976). Moreover, the recent change to South Carolina's statutory definition of "prior violent crime" which respondent cites as proof of the impermanence of South Carolina's parole restrictions, Brief of Respondent at 16-17 n. 3, has not altered petitioner's

> 2. *"[T]he fact that an inmate is not parole eligible does not mean that he would never be released from prison. . . . Testimony was presented in camera that it could not be said that he would always remain behind bars."* Brief of Respondent at 48-49.

Respondent's attempt to show that South Carolina law does not ensure petitioner's continued confinement actually demonstrates the opposite. Respondent stresses that no *statute* precludes furlough or work-release for life-without-parole inmates, while glossing over the fact that state regulations do expressly prohibit work-release and almost all furloughs for such inmates. J.A. 15-16. The record indicates, moreover, that no parole-ineligible life term inmate has ever been furloughed. J.A. 16. As for a pardon, the relevant statute itself requires "the most extraordinary circumstances," S.C. Code Ann. § 24-21-950(D) (1989), and respondent's suggestion that petitioner might be pardoned while serving his life-without-parole sentence for capital murder is simply fanciful. Another South Carolina code section cited but not identified by respondent, Brief of Respondent at 48 n. 8, allows consideration for early release for "any inmate afflicted with a terminal illness where life expectancy is one year or less," S.C. Code Ann. § 24-21-970 (1989) – again, hardly a major factor in any rational assessment of petitioner's

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own parole ineligibility in any way, and is in any event reasonably likely to be repealed by legislation already prefiled for the 1994 session of the South Carolina General Assembly by the chairman of the House Judiciary Committee, H.R. 4365, 110th Leg., 2d Sess. (1993), and by two members of the Senate Judiciary Committee. S. 932, S. 935, 110th Leg., 2d Sess. (1993).

potential future dangerousness, or of the retributive severity of South Carolina's life-without-parole sanction.[2]

> 3. *Any accurate instruction must include "commutation and clemency . . . [and] judicial modification of sentence."* Brief of *Amici Curiae* Idaho *et al.* at 3.

In making this argument, *amici* appear unaware that neither the executive nor the judiciary has the power to commute prison sentences under South Carolina law. S.C. Const. art. IV, § 14 (1976) (Governor may commute only death sentences); *State v. Best*, 257 S.C. 361, 186 S.E.2d 272 (1972) (sentencing judge lacks jurisdiction to modify sentence after expiration of term in which it was imposed).

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[2] While respondent labors to convince the Court that parole ineligibility is a matter of relatively little consequence under South Carolina law, to at least one of respondent's attorneys the difference between parolable and non-parolable life imprisonment appears to be literally one of life and death. Denouncing the 1993 statutory curtailment of a different part of South Carolina's no-parole provisions as " 'a despicable act by someone who didn't want to debate the issue in public,' " Solicitor Harpootlian has recently announced that "he intends to seek the death penalty in a Richland County murder case because the victim's family is no longer guaranteed the killer faces life without parole if convicted of his second violent offense." William Fox and Tim Flach, *Law Making More Eligible for Parole Comes Under Fire*, Greenville [S.C.] News, Dec. 1, 1993, at 1A, 5A. Thus despite the assertions in his brief, the prosecutor in this case seems to understand the great importance of parole ineligibility as a facet of a capital murderer's punishment, and it is reasonable to suppose that an accurately instructed jury might have taken a similar view.

> 4. *"[T]he majority of the death penalty states do not instruct their capital juries on the issue of parole eligibility. A majority of these states do not instruct their juries beyond a "plain reading" of that state's death penalty statute."* Brief of *Amici Curiae* Idaho *et al.* at 6.

The first of these statements is incorrect and the second is misleading. As petitioner has already pointed out, all but a handful of life-without-parole states inform the jury of the true meaning of the life sentence alternative. Brief for Petitioner at 39-41 nn. 23-25. In most of these states, a "plain reading" of the death penalty statute is a wholly adequate means of achieving this, since the statutes themselves refer to the unavailability of parole for life-sentenced capital murderers. *Id.*, n. 23. Moreover, *amici*'s assertion to the contrary notwithstanding, even those relatively few states which still authorize parole for capital murderers generally inform sentencing juries of the parole restrictions imposed by state law. Of the six states that involve juries in capital sentencing and have no life without parole alternative, five – Kentucky, New Jersey, New Mexico, North Carolina and Ohio – require that the jury be informed of the time which must be served before parole eligibility.[3] Only Texas, which

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[3] **Kentucky:** Ky. Rev. Stat. Ann. § 532.030 (Michie 1990) (jury must choose between death, life imprisonment with no parole eligibility for 25 years, life imprisonment with no parole eligibility for 12 years, or a term of not less than 20 years); **New Jersey:** 1993 N.J. Sess. Law Serv. Ch. 27 (West), N.J. Stat. Ann. 2C:11-3(b)-(f) (West Supp. 1993) (jury must be instructed that defendant will serve at least 30 years without parole if not sentenced to death); *State v. Bey*, 129 N.J. 557, 610 A.2d 814 (1992) (finding federal constitutional right to accurate

recently increased to 40 years the minimum term to be served by life-term capital murderers before parole eligibility, 1993 Tex. Sess. Law Serv. ch. 900 § 6.01 (Vernon), *amending* Tex. Code Crim. Proc. Ann. art. 42.18 § 8(b)(2), has yet to require jury instructions on parole ineligibility.[4] Although the practices of these jurisdictions are not directly relevant to petitioner's constitutional claim, the

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information on minimum 30-year term of incarceration); **New Mexico:** *State v. Henderson*, 109 N.M. 655, 789 P.2d 603 (1990) (federal constitutional right to instruction on 30-year parole ineligibility for capital murderer sentenced to life imprisonment); **North Carolina:** 1993 N.C. Sess. Laws Ch. 538 §§ 29, 56 (amending N.C. Gen. Stat. § 15A-2002 (Michie-Supp. 1993), effective Jan. 1, 1995, to require capital sentencing instruction that "life imprisonment means a sentence of life with eligibility for parole consideration after 25 years"); **Ohio**: Ohio Rev. Code Ann. § 2929.03(C)(2) (Page 1993) (sentencing jury decides between death, life imprisonment without eligibility for parole for 30 years, and life imprisonment without eligibility for parole for 20 years); *State v. Mills*, 62 Ohio St.2d 357, 374-75, 582 N.E.2d 972, 987-88 (1992) (approving instructions on 30-year and 20-year eligibility).

[4] Interestingly, a Texas "truth-in-sentencing" statute requires that sentencing juries be given a wealth of information concerning defendants' parole and "good-time" eligibility in *non*-capital cases, 1993 Tex. Sess. Law Serv. ch. 900 § 5.02 (Vernon), *amending* Tex. Code Crim. Proc. Ann. art. 37.07, § 4 (West Supp. 1993), but capital cases are expressly excluded from the statute's effect, *id.*, § 4(b), and capital sentencing juries are told only that the defendant will be sentenced to "life imprisonment" if not sentenced to death. Tex. Pen. Code Ann. § 12.31(b) (West 1993); *Knox v. State*, 744 S.W.2d 53, 62-64 (Tex. Crim. App. 1987), *cert. denied*, 486 U.S. 1061 (1988), *habeas relief granted*, 928 F.2d 657 (5th Cir. 1991); *Boyd v. State*, 811 S.W.2d 105, 121 (Tex. Crim. App.), *cert. denied*, 112 S.Ct. 448 (1991).

general willingness of even these states to enlighten capital jurors concerning the limitations on capital murderers' parole eligibility makes South Carolina's refusal to instruct on that state's absolute prohibition of parole all the more difficult to understand.

CONCLUSION

The judgment of the South Carolina Supreme Court affirming petitioner's sentence of death should be reversed.

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No. 92-9059

In The

Supreme Court of the United States

October Term, 1993

JONATHAN DALE SIMMONS,

Petitioner,

vs.

SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of South Carolina

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT: THE STATE OF IDAHO, JOINED BY ARIZONA, CALIFORNIA, CONNECTICUT, ILLINOIS, KENTUCKY, LOUISIANA, MONTANA, NEW JERSEY, NORTH CAROLINA, SOUTH DAKOTA AND TEXAS

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QUESTIONS PRESENTED

1.

DOES THE EIGHTH AMENDMENT ENTITLE A CAPITAL DEFENDANT TO HAVE THE SENTENCING JURY INFORMED, AS A REASON NOT TO IMPOSE THE DEATH PENALTY, THAT UNDER STATE LAW THE JURY'S SENTENCING ALTERNATIVE OF "LIFE IMPRISONMENT" MEANS LIFE WITHOUT THE POSSIBILITY OF PAROLE?

2.

DID THE TRIAL COURT'S REFUSAL TO INFORM THE JURY THAT PETITIONER COULD NEVER BE PAROLED IF SENTENCED TO LIFE IMPRISONMENT VIOLATE HIS DUE PROCESS RIGHT TO REBUT THE PROSECUTION'S CASE FOR DEATH, WHERE THE STATE ARGUED THAT PETITIONER WOULD POSE A GRAVE RISK OF FUTURE VIOLENCE UNLESS HE WAS EXECUTED, AND WHERE THE JURY SPECIFICALLY ASKED ABOUT THE POSSIBILITY OF PAROLE?

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INTERESTS OF AMICI CURIAE

The States have a continuing interest in rules of Constitutional law which threaten to make more difficult their responsibility for the enforcement of state criminal laws. The rule urged by Simmons would adversely affect the accuracy of state criminal trials by leading jurors to speculate about future conditions of the defendant's confinement and to do so on the basis of incomplete information and imponderable variables.

SUMMARY OF ARGUMENT

I. Whether the jury should be instructed that a sentence of life imprisonment without parole may, or may not, be imposed is a question best left to the states. The Due Process Clause does not require the states to give jury instructions based on speculative future possibilities.

II. The sentencing decision in a criminal case is a complex, discretionary process. It cannot be accurately described by statistical studies and such studies should not be accepted as a basis for concluding that it is necessary to instruct the jury about parole possibilities in order to maintain a fair sentencing system.

III. The Due Process Clause does not require the states to follow jury instruction procedures of questionable validity. The instruction proposed by the petitioner is not something that is a fundamental element of a fair trial or sentencing proceeding.

The Eighth Amendment protection against arbitrariness in capital sentencing proceedings does not require that the alternative of a life sentence without possibility of parole be

considered a mitigating factor. An instruction that attempts to predict future parole or clemency conditions does not bear on the defendant's character, the nature of the crime, or other factors that tend to reduce the defendant's personal culpability.

ARGUMENT

I.

The State's Interest In Defining Factors That Have Particular Relevance To Capital Sentencing Decisions Would Be Undermined By A Constitutional Rule Requiring Sentencers To Consider A Sentence of Life Imprisonment Without Parole To Be Permanent Incapacitation And A Reason Not To Impose The Death Penalty.

The Court's decision *California v. Ramos*, 463 U.S. 992, (1983) embodies an important principle respecting the deference owed to state choices about factors relevant to sentencing determinations. In *Ramos*, the Court held that there was no constitutional impediment to informing a sentencing jury of the governor's power to commute death sentences. It was emphasized that beyond limitations designed to curb arbitrariness and to guarantee the accused an opportunity to respond to adverse evidence against him, "the Court has deferred to the state's choice of substantive factors relevant to the penalty determination." 463 U.S. at 1001.

Petitioner theorizes that the constitutional guarantee of due process of law and the Eighth Amendment guarantee against cruel and unusual punishment require that a sentencing jury be informed that a sentence of life imprisonment means no parole. Simmons argues that this result is necessary to insure that the jury receives complete information

about the factors that may bear on a decision to impose the death penalty. To the contrary, however, such an instruction creates the inaccurate impression that a killer such as Simmons will not pose a future threat to society if he receives a life sentence. As the Court pointed out in *Ramos*, "to describe the sentence as life imprisonment *without possibility* of parole is simply inaccurate when, under state law, the governor possesses authority to commute that sentence to a lesser sentence that includes the possibility of parole." 463 U.S. at 1009 (Court's emphasis).

In addition to commutation and clemency, other unpredictable factors such as escape, judicial modification of sentence and violence toward other prison inmates are considerations relevant to future dangerousness in nearly every case. A life without parole instruction would be complete and accurate only if it accounted for an almost unlimited inquiry into such variables. An accurate instruction would thus read something like this:

> You are advised that a life sentence without possibility of parole means the defendant will never be paroled and will be isolated from society, unless his sentence is commuted, unless he is granted clemency, unless his sentence is reduced by judicial action or unless he escapes from prison. While incarcerated, he may pose a risk to other inmates and prison staff, which you may infer from past violent behavior.

Obviously, petitioner does not seek full and accurate instructions about future possibilities. Instead, he asks for a partial, biased disclosure relating to the risks he may pose to the public in the future. Most, if not all, of these future possibilities are highly speculative and would permit juries

to make sentencing decisions on the basis of uninformed guesses.

Furthermore, the argument that jurors should be encouraged to incorporate parole possibilities into the sentencing equation is an argument in effect that jurors should be given a special opportunity to avoid the statutory duty to consider the death penalty based on evidence of aggravating factors, the circumstances of the crime, and the character of the defendant. It is not desirable to divert the focus of sentencing away from questions of personal culpability. Nor is it necessary in order to ensure that the jury is fully advised to instruct on the prospect of permanent incarceration. Parole ineligibility is not the antithesis of future dangerousness. If a jury considers future dangerousness based on the defendant's behavior, it is not necessary that it also be able to consider the possibility that the state may succeed in restraining such behavior in the future in order to answer the question, "Is the defendant likely to be dangerous in the future?" Simmons proposes that he should be able to tell the jury that he may be dangerous in the future but that the state may be able to restrain him. It is just this kind of empirically debatable proposition that the Due Process Clause does *not* address. *See Williamson v. Lee Optical*, 348 U.S. 483 (1955).

Simmons contends that it is a denial of due process when the state has made a future dangerousness argument to keep from him the right to have the sentencer consider *limitations* on future dangerousness. The argument, however, is only superficially appealing. The state's position in Simmons' case was that it is appropriate to predict future dangerousness from past incidents of

dangerous conduct. It does not follow that it may be inferred with comparable reliability that a sentence of life imprisonment is genuinely incapacitating. In *Ramos*, the Court, while recognizing that predictions of human behavior are often essential to the criminal justice process, also recognized qualitative differences among kinds of predictions. *Ramos* leaves it open to the states to conclude that predictions subject to too many uncontrolled variables should be excluded from consideration. Simmons offers a prediction which must depend upon data that cannot be evaluated by the sentencing authority. No mechanism exists by which the jury could be equipped to accurately predict whether the defendant will in fact remain in prison if he is sentenced to life imprisonment and, if he does, whether the risk that he will harm others will be abated. These questions cannot be answered unless the jury knows something about who will consider commutation or clemency, what the criteria will be, whether the defendant will escape from prison, or whether he will successfully attack his sentence on appeal. Predictions of future dangerousness based on past conduct are, on the other hand, based on data known to the jury. As the Court pointed out in *Ramos*, "the instruction [in California] invites the jury to predict not so much what some future governor might do, but more what the defendant himself might do if released into society." 463 U.S. at 1005. Recognition of the jury's ability to make rational predictions based on known behavior should not open the door for a requirement that juries be allowed to speculate wildly about uncontrollable future events.

Petitioner asserts that his request for a jury instruction detailing his non-eligibility for parole under South Carolina law would have been honored "in all but two other comparable states." *See* Petitioner's Brief at 47. In fact, the majority of the death penalty states generally do not instruct their capital juries on the issue of parole eligibility. A majority of these states do not instruct their juries beyond a "plain reading" of that state's death penalty statute. Like the respondent state of South Carolina, the states of North Carolina, Pennsylvania, Texas and Virginia have death penalty statutes providing that the jury decides between death or life imprisonment without further explanation of what "life" means under state law.

Aside from this life or death alternative, the other death penalty states make use of a wide variety of sentencing alternatives.[1] Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Indiana, Louisiana, Missouri, New Hampshire, New Jersey, South Dakota, Tennessee, Washington and Wyoming have adopted a death penalty statute, the plain reading of which gives the sentencing jury the alternatives of death and life without parole (sometimes only for a fixed number of years) or life without the possibility of release. Other states such as Georgia, Idaho, Maryland, Nevada, Oklahoma, and Oregon have the sentencing alternatives of death, life without parole and parole-eligible life. Still other states, such as Florida provide that life without parole is available only for a certain category of murders, but generally provide the sentencing jury with a choice between death and parole-eligible life after serving

[1] See, Petitioner's Brief, footnotes 23-27.

a minimum mandatory sentence. Ohio provides the sentencing jury with the alternatives of death and life with parole after a certain term of years has been served. Illinois provides sentencing alternatives of death, mandatory natural life, under certain circumstances, discretionary natural life, under certain circumstances, or a fixed term of years with parole. In Kentucky the capital jury sentencing alternatives are death, life without parole for a fixed term of years, life, or a fixed term of years.

Despite the diversity seen in the various death penalty sentencing alternatives, most of the death penalty states do not instruct juries on the issue of parole. Most of those death penalty states contacted report that the general rule is to instruct the capital sentencing jury simply by a plain reading of the death penalty statute, or perhaps, a jury instruction that generally echoes the language for the death penalty statute.

In addition to the "plain reading" approach, some states, by court decision and/or state statute, have prohibited the discussion of the offender's eligibility for parole under state law. *See Quick v. State*, 353 S.E.2d 497 (Ga. 1987) (capital jury cannot consider defendant's parole eligibility in sentencing phase)[2], O.C.G.A. Code 17-8-76; *State v. Brown*, 293 S.E.2d 569 (N.C. 1982), *cert. denied*, 459 U.S. 1080, 103 S. Ct. 503 (1982) (trial court's refusal to give capital defendant's requested jury instruction regarding parole eligibility not error); *Francis v. Commonwealth*, 752 S.W.2d 309 (Ky. 1988); *State v. Copeland*,

[2] Since this decision, Georgia has added under O.C.G.A. § 17-10-31.1(9) (Supp. 1993) a sentencing option of life without parole.

530 So.2d 526 (La. 1988), *cert. denied*, 489 U.S. 1091, 109 S. Ct. 1558 (1989); and *Jones v. State*, 843 S.W.2d 487 (Tex. Crim. App. 1992) *cert. denied*, ___ U.S. ___, 113 S. Ct. 1858 (1993), Tex. Code Crim. Proc. Ann. art. 37.07 § 4(a).

On the other hand, at least six other states provide by case law, statute or uniform jury instruction that a capital jury is instructed upon the offender's non-eligibility for parole. Maryland, by its decision in *Doering v. State*, 545 A.2d 1281 (Md. 1988), requires that, upon the capital defendant's request, the trial court must instruct the jury that the defendant is not eligible for parole under state law. Another state, Colorado, under its prior law where a capital sentencing alternative was life with parole eligibility after a fixed term of years, provided the capital jury with an instruction as to what "life" meant under state law. *See* § 17-22.5-104, Colo. Rev. Stat. (1986). New Jersey, in *State v. Martini*, 619 A.2d 1208, 1277-80 (N.J. 1993), allows a capital sentencing jury to be instructed on the offender's status for parole under state law. Oregon provides a jury instruction that explains in detail its capital sentencing options of life without parole and life with parole eligibility after a fixed term of years. Florida now provides a mandatory life term for the murder of a law enforcement officer, and as such, amended its standard jury instruction to reflect parole non-eligibility under this circumstance. *See Standard Jury Instructions – Criminal Cases*, 603 So. 2d 1175 (Fla.1992). Nevada provides by case law that a jury instruction regarding the possibility of pardon or parole is relevant to a capital sentencing hearing. See *Petrocelli v. State*, 692 P.2d 503 (Nev. 1985).

In summary, petitioner's contention that all but two death penalty statutes would require a parole-eligibility instruction is misleading. The simple fact that a death penalty statute uses the term "without parole" does not mean that the jury will not question that issue during its deliberations. In addition to the respondent state of South Carolina, the states of North Carolina, Pennsylvania, Virginia and Texas do not instruct capital juries on the offender's eligibility for parole should the jury so inquire. Prior to adopting a life without parole alternative, Georgia also declined to give a similar jury instruction. Moreover, even those states such as Louisiana which provide a no-parole life sentence as a sentencing alternative, the jury could still inquire as to the actual period of incarceration covered by such a sentence. In *Copeland, supra*, the Louisiana Supreme Court has been consistent in its opinion that a trial judge should avoid any "discussion of future remedial measures" and instead focus the sentencing jury upon the statutory aggravating and mitigating circumstances, *Id.*, 530 So. 2d at 538.

Just as states are free, under our federal system, to choose alternatives to a death sentence and alternative systems for commutation, parole and pardon, so must they be free from a jury instruction which may be inconsistent with or an inaccurate view of the law.

A constitutionally based instructional rule of the kind for which Simmons contends might produce unexpected results in states with parole eligibility statutes. Petitioner's argument is that the sentencing jury is entitled, as a constitutional matter, to consider a state's announced incarceration policy to be a determinant of future dangerousness. If that is so, those states where life sentences can

be affected by parole might well consider the possibility of parole a determinant in *favor* of the death penalty, in which case petitioner would likely claim that his own proposal is unconstitutional.

The Court held in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) that " . . . it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." 472 U.S. at 328-329. The Court pointed out that its cases are intended to facilitate the responsible and reliable exercise of sentencing discretion. This purpose is not served by the rule for which Simmons contends. Instead, a jury would be asked to make sentencing determinations on the basis of a misleadingly selected view of the facts. Justice O'Connor pointed out in *Caldwell* that *Ramos* was not meant "to imply that the giving of non-misleading and accurate information regarding the jury's role in the sentencing scheme is irrelevant to the sentencing decision." In *Caldwell*, the problem was that "the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." *Caldwell v. Mississippi*, 472 U.S. at 341, O'Connor, J. (concurring in part and concurring in the judgment). *See also, Fleenor v. State*, ___ N.E.2d ___, (1993, WL 334267) (Indiana). A "no parole" instruction would be similarly inaccurate and misleading.

II.

Petitioner's Statistically Based Argument For A Particular Legal Policy is Inappropriate

Simmons proposes that the States be required to follow a particular theory of jury instruction based, in part, on a survey purporting to show that most prospective jurors believe that offenders sentenced to imprisonment are eventually released. This is not the first time it has been suggested that complex discretionary judgments can somehow be measured by the application of statistical techniques and that legal policy can appropriately be made to depend upon the results.

In *McCleskey v. Kemp*, 481 U.S. 279 (1987) it was argued that a study focusing on racial characteristics of the victims of murder was good evidence of a pattern of discrimination in the capital sentencing system of Georgia. The district court found that the study was flawed in several particulars: (1) the questionnaires furnished to participants did not capture the full degree of aggravating circumstances, (2) the researchers had made questionable decisions about how to treat unknown variables, (3) base rate data was flawed, (4) the study lacked information on the race of the victim in cases involving multiple victims or whether plea bargains had been offered, and (5) the trustworthiness of the data had not been established. This Court held that such a study would not be the basis for an inference of discrimination in McCleskey's case. The holding in McCleskey applies in the same way here. It cannot be concluded that the views of other persons studied in South Carolina were those of the jury that sat on the case. To give credence to Simmons' statistical proffer would require reliance on the

groundless inference that Simmons' jurors had the same views about parole as those who were part of the study, an inference the Court expressly refused to draw in *McCleskey*. Furthermore, the record appears to contain no basis for independent evaluation of the validity of methods used in the study and its credibility is therefore unknown.

The difficulty of using statistical data to account for all of the variables that go into a sentencing decision is illustrated by *Gacy v. Welborn*, 994 F.2d 305 (7th Cir. 1993)

> The Constitution establishes a system of jury trials, which necessarily tolerates the shortcomings of that institution. Pointing to one of those shortcomings, no matter how vivid, does nothing to undercut the Constitution's own method.
>
> Professor Zeisel [who tried to study juror comprehension of instructions] did not try to isolate the effect of the state's drafting choices. For all we can tell, the best conceivable exposition would have reduced the misunderstanding rate on question four from twenty-five percent to twenty-four percent, with comparably paltry changes on other questions. The study does not justify chastising the state, as opposed to the Supreme Court or the institution of the jury or the failings of the species.
>
> If the study enabled us to lay some responsibility at the state's doorstep, this still would not permit a federal court to take a blue pencil to a state's jury instructions. 994 F.2d at 312.

A more useful empirical inquiry than that offered by Simmons would have been to investigate qualitatively

whether the jury system consistently produces defensibly accurate results. That should be the underlying concern but Simmons glosses over the real point by his use of statistical data which is of more academic than practical interest. Basing an instructional rule of constitutional dimension on such a foundation would run counter to the precept of *Ramos* that deference is owed to the states on such points.

III.

Simmons Seeks To Apply The Due Process Clause and The Eighth Amendment Too Broadly.

The Due Process Clause does not guarantee resort to empirically debatable propositions. *Williamson, supra.* Historically, the Clause has been applied to deliberate decisions of government agents to deprive one of life, liberty or property. Its protections were intended to secure the individual from the arbitrary exercise of the powers of the government. *Daniels v. Williams*, 474 U.S. 327 (1986). The Clause promotes fairness by requiring that appropriate procedures be followed. *Id.* The Court has said that the Due Process Clause protects the individual against two types of government action:

> So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, or interferes with rights implicit in the concept of ordered liberty. *Palko v. Connecticut*, 302 U.S. 319.
>
> When government action depriving a person of life, liberty or property survives substantive due process scrutiny, it must still be

> implemented in a fair manner. *Matthews v. Eldridge*, 424 U.S. 319. This requirement has traditionally been referred to as procedural due process. *United States v. Salerno*, 481 U.S. 739, 746 (1987).

The Court has also held that the Due Process Clause is violated when government action offends some principle of justice so deeply rooted in our legal traditions as to be considered fundamental. *Snyder v. Massachusetts*, 291 U.S. 97 (1934). The legal process that is due is that which has received judicial acceptance as an important element of fair proceedings.

These principles do not help Simmons. He presents only a claim that a doubtful instruction should be required as a matter of fundamental fairness. But it is hardly required by the concept of ordered liberty that trial courts in criminal cases give juries incomplete instructions about future possibilities. Nor can it appropriately be said that to fail to instruct juries in this fashion will produce arbitrary sentencing judgments.

Simmons also argues that he was entitled to an instruction that the alternative of a life sentence without parole was a mitigating factor that he was denied an opportunity to present in violation of the Eighth Amendment. This proposition was persuasively answered by the Court of Appeals for the Eleventh Circuit in *United States v. Chandler*, 996 F.2d 1073, 1085 (11th Cir. 1993).

> Chandler . . . suggests that applicable precedent, mandating that a defendant be allowed to introduce evidence relating to mitigating factors, requires that the jury be informed of the possibility that Chandler would receive a life sentence without parole if death was not recommended. The Supreme Court has defined mitigating factors as "any aspect of a defendant's character or record and any of the circumstances of the offense." Lockett v. Ohio, 438 U.S. 586, 604; *See* Skipper v. South Carolina, 476 U.S. 1 (1986). The range of possible sentences that Chandler might receive in the event the jury did not recommend death does not fall within this definition. Accordingly the district court was not required to inform the jury of the possible sentences Chandler might face.

It seems obvious that an unrealized possibility, such as permanent incarceration, cannot be viewed as a mitigating factor. It may not happen. The defendant might be released on parole after a commutation of his sentence. In any case, future parole possibilities, or the lack of them, have nothing to do with the defendant's character or other circumstances that might mitigate the severity of the crime.

CONCLUSION

Amici urge that the judgment below be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JONATHAN DALE SIMMONS,

Petitioner,

vs.

SOUTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

AMICI CURIAE BRIEF OF DONNA L. MARKLE AND PATRICIA ANN KNIPFER IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The questions presented by this case are:

1.

In this capital case, did the trial court's refusal to inform the sentencing jury that petitioner could never be paroled if sentenced to life imprisonment violate his due process right to rebut the prosecution's case for death, where the state argued that petitioner would pose a grave risk of future violence unless he was executed, and where the jury specifically asked about the possibility of parole?

2.

Does the Eighth Amendment entitle a capital defendant to have the sentencing jury informed, as a reason not to impose the death penalty, that under state law the jury's sentencing alternative of "life imprisonment" means life without the possibility of parole?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JONATHAN DALE SIMMONS,
Petitioner,

vs.

SOUTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

MOTION BY DONNA L. MARKLE AND
PATRICIA ANN KNIPFER FOR LEAVE
FILE A BRIEF AS AMICI CURIAE

Pursuant to Supreme Court Rule 37, Donna L. Markle and Patricia Ann Knipfer move for leave to file the brief submitted herewith as amici curiae.

Counsel for the Petitioner has consented to the filing of the brief, but counsel for the Respondent has refused consent.

Donna L. Markle and Patricia Ann Knipfer (hereinafter the "amici") are former jurors in a capital case who were denied the right to have information concerning the meaning of the life sentence alternative. In the case in which the amici served, the life sentence would have been life without the possibility of parole. Thus, the experience of the amici was similar to the experience of the jurors in the case before the Court.

The amici are particularly interested in this case because it

presents matters of concern to ordinary citizens who are called upon to serve as jurors in capital cases. The amici believe that the filing of their brief amici curiae is desirable because it presents to the Court significant information, based upon a unique perspective, concerning the issues presented in this case. The interests of the amici are different from those of the parties in that they, as jurors, were called upon to make the ultimate decision of whether a person should live or die, a decision with which they must live forever. The amici feel that the state should not call upon citizens to make that decision and then

systematically withhold from them information that they would consider highly relevant to their sentencing decision.

The amici believe that their brief will substantially assist this Court by providing it with a different perspective from which to evaluate the facts of this case. Accordingly, the amici repsectfully request the Court to grant this motion for leave to file an amici curiae brief.

Dated: November 15, 1993

Respectfully submitted,

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No. 92-9059

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BRIEF AMICI CURIAE OF DONNA L. MARKLE AND PATRICIA ANN KNIPFER IN SUPPORT OF PETITIONER

Donna L. Markle and Patricia Ann Knipfer, former capital jurors, submit this brief as *amici curiae*, pursuant to Rule 37 of the Court's rules, to assist the Court in determining whether the Eighth Amendment entitles a capital defendant to have the sentencing jury informed, as a reason not to impose the death penalty, that under state law the jury's sentencing alternative of "life imprisonment" means life without the possibility of parole.

STATEMENT OF INTEREST OF AMICI CURIAE

This brief is filed on behalf of former jurors in capital sentencing proceedings who were denied accurate information regarding the meaning of the life sentence alternative. In the capital case in which these jurors served, the life sentence alternative would have been a life sentence without the possibility of parole. Denied that information, and operating on the commonly-held assumption that a life sentence carries the possibility of parole after a period of years, the jury sentenced the defendant to death. In doing so, they relied partly on the state's argument that the defendant would otherwise constitute a continuing threat to society. Had they been given accurate information regarding the nature of the life sentence alternative, that information would have been highly material to their decision regarding punishment.

These jurors may be called upon to serve again, and they are concerned that the situation described herein should not be allowed to recur, either to themselves or to other jurors in capital cases. They respectfully submit that their perspective on the question presently before the Court is unique, a perspective that the parties to this litigation cannot properly bring to the Court's attention. The *amici* are not attorneys, institutions or legal organizations and have no real interest in the ultimate outcome of the case before the Court. Their interest in this matter is the interest of ordinary citizens who are called upon serve on capital juries and who, in that capacity, desire to know the full truth about the choices they must face.

The *amici* respectfully ask the Court, in weighing the interests of the parties and determining the questions presented by this case, to also take into account the concerns of citizens such as themselves, who are called upon to decide the ultimate question of whether a fellow man or woman should live or die.

ARGUMENT

Donna L. Markle and Patricia Ann Knipfer served as jurors in the Virginia trial of Dennis Wayne Eaton, who was was tried and convicted of capital murder in the Circuit Court for the County of Rockbridge, Fauquier, Virginia, in November 1989. Before trial, Mr. Eaton pleaded guilty to three additional murders. As a result of those guilty pleas, pursuant to Va. Code Ann. § 53.1-151 B1, he would never have been eligible to be considered for parole had he been sentenced to life imprisonment. During the sentencing phase of the trial, the prosecutor argued that Mr. Eaton should be sentenced to death because he otherwise would commit acts of violence that would constitute a continuing threat to society. However, under an archaic state law Mr. Eaton was prevented from informing the jury of his ineligibility for parole if he were sentenced to life imprisonment. Unaware of the true meaning of the life sentence, the jury sentenced Mr. Eaton to death on the statutory ground of his "future dangerousness" to society.

The *amici* did their duty in rendering a sentencing verdict based on the evidence and on the law that they were given. Now, as part of the burden of their civic service, they must live for the rest of their lives with the memory of the irrevocable decision they made in the jury room. This is not, in a capital case, an easy thing to do. But what has happened in the *Eaton* case has made it much harder. For after participating in the decision to put Mr. Eaton to death, the *amici* learned that his "future dangerousness" had been systematically exaggerated in the courtroom by the state's withholding from the jury the crucially important fact that he would never have been eligible for parole if the jury had let him live.

The potential effect on Mr. Eaton of this manipulation of the jury's sentencing decision is obvious. But he is not the only one adversely affected. The *amici*, as jurors who assumed personal responsibility for recommending his execution, also feel the impact of what occurred. Having learned of his parole ineligibility only after ordering his death, it is now much harder to

believe that they did the right thing. And because what they did involved choosing death over life, this doubt can be a substantial burden to bear.

This Court has repeatedly recognized that jurors in capital sentencing proceedings serve in one of the most difficult capacities in the criminal justice system. *See, e.g., Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) (referring to "the awesome power that a sentencing jury must exercise in a capital case"); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) ("this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State"); *McGautha v. California*, 402 U.S. 183, 207 (1971) (referring to "the truly awesome responsibility of decreeing death for a fellow human" that is imposed upon capital jurors). This "awesome responsibility" carries with it certain inherent emotional and pyschological strain that is often overlooked by a criminal justice system concerned primarily with lawyers, defendants and judges.[1] Recent studies have indicated that jurors who have made the decision to sentence a defendant to death experience extreme emotional disturbances, sometimes for years afterward, as a result of having made that decision. *See generally* Leigh B. Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 Ind. L.J. 1333 (1993) (reporting results of various studies and suggesting that post-trial jury counseling may be needed in some cases).[2]

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[1] As one judge in Howard County, Maryland aptly noted in discussing the effects of capital cases on jurors, "jurors . . . have kind of been the forgotten men and women of the criminal justice system." *See* Graciella Sevilla & Dan Beyers, *For Jurors, Grisly Trials Can Take Toll; Panel in Basu Carjacking Case Undergoes "Stress Debriefing"*, Washington Post, Aug. 20, 1993, at C1.

[2] Only recently has attention turned to the impact of capital trials on the jurors. Not surprisingly, those studies that have been done have concluded, as Bienen reports, that "[j]urors in capital cases, and jurors who actually choose the death penalty, may feel the burdens of this responsibility especially keenly." 68 Ind. L.J. at 1340. *See also* Kate Darby Rauch, *Some Juries Form Bonds That Last*

(Footnote continued)

As one commentator has noted, "[c]ommon sense suggests that virtually any person given the responsibility of determining whether a convicted murderer should be condemned to death or sentenced instead to life imprisonment would want information about what 'life' imprisonment really means." *See* William W. Hood, III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605 (1989). It is simply wrong to subject jurors to the singularly difficult task of deciding whether a person should be executed and then to systematically withhold from them highly relevant information about the alternative sentence. Yet this is exactly what happened to the *amici*, and to the jurors in this case. *See Morgan v. Illinois*, 112 S. Ct. 2222, 2231 n.6 (1992) ("juries must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed") (citations and quotations omitted); *Walton v. Arizona*, 497 U.S. 639, 653 (1990) ("When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process.").

The thoughts and feelings of the *amici*, of course, are no longer relevant to the judicial process: their jury service is over, and that is that. But they must live with their own feelings for the rest of their lives. It is no small thing to realize that one may have ordered the execution of a man who could and perhaps should have been spared. And it is no small thing that the state, without any good reason that the *amici* can see, has put its own citizens in so difficult a position. Jury service involves many sacrifices, but it should not require this.

In addition to the above concerns, there is another reason why capital juries in cases such as this one should be given accurate

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Beyond the Trial, Washington Post, Apr. 14, 1992, at Z10 (reporting that Washington jurors who sentenced Westley Alan Dodd to death experienced long-term emotional difficulties); Daniel Goleman, *For Many Jurors, Trials Begin After the Verdict*, N.Y. Times, May 14, 1991, at C1 (reporting study which concluded, *inter alia*, that "factors that made jurors more likely to have stress symptoms included having to rule on a death sentence. . . .").

information regarding the alternative life sentence. The use of juries in criminal cases, in addition to providing a group of peers to stand between the accused and the state, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), also serves the very important purpose of allowing the citizenry to play an active role in the functioning of their government. *Batson* v. *Kentucky*, 476 U.S. 79, 87 (1986); *Balzac* v. *Porto Rico*, 258 U.S. 298, 310 (1922). As this Court explained in *Powers* v. *Ohio*, 111 S. Ct. 1364, 1366 (1991), "[j]ury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." The Court continued:

> The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system. . . . [T]he institution of the jury raises the people itself . . . to the bench of judicial authority [and] invests the people . . . with the direction of society. . . . The jury system postulates a conscious duty of participating in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse. . . . Jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all of the people. . . . It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for the law. . . . Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

Id. at 1368-1369 (numerous citations and quotations omitted).

As with any other "democratic process," however, those who participate in jury service may not do so meaningfully if they

are systematically deprived of basic information regarding the alternatives they face. *Cf. Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). Thus, where capital jurors are deprived of accurate information regarding the meaning of the sentencing alternatives, they are simply unable to consciously and intelligently participate in the "machinery of justice." Such denial limits the ability of those citizens to participate the processes of their government, harming not only the litigants themselves, but also the jurors and the community at large. *See Batson*, 476 U.S. at 87. It interferes with public participation in the processes of government, deprives jurors of the ability to prevent arbitrariness in the judicial system and undermines "respect for the law."

While the state may have some interest in concealing the truth from jurors, the *amici* simply cannot imagine what that interest might be in the present situation. Whatever interest the state may claim, however, the *amici* submit that they, too, are citizens of this Nation, and they respectfully request that in conducting whatever balancing the Court may do in this case their interests, concerns and experiences be taken into account, as well.

CONCLUSION

In deciding whether the Constitution requires that the capital sentencing jury be told that a life sentence would mean life without the possibility of parole, the Court should take into account, in addition to the arguments presented by the parties to this case, the interests of ordinary citizens who are called upon to serve as jurors and to make the ultimate life-or-death decision.

Dated: November 15, 1993

Respectfully submitted,

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